

APPENDIX X  
GLBU: DOH01

Contract Number: C036361 Contractor: Fried, Frank, Harris, Shriver & Jacobson, LLP

Amendment Number X- 1 BSC Unit ID: 3450000

This is an AGREEMENT between THE STATE OF NEW YORK, acting by and through NYS Department of Health, having its principal office at Albany, New York, (hereinafter referred to as the STATE), and Fried, Frank, Harris, Shriver & Jacobson, LLP (hereinafter referred to as the CONTRACTOR), having its mailing address at 1 New York Plaza, New York, NY 10004, for amendment of this contract.

This amendment makes the following changes to the contract (check all that apply):

- ☐ Modifies the contract period at no additional cost
- ☒ Modifies the contract period at additional cost
- ☒ Modifies the budget or payment terms
- ☐ Modifies the work plan or deliverables
- ☒ Replaces appendix(es) C with the attached appendix(es) C-1
- ☐ Adds the attached appendix(es) \_\_\_\_\_
- ☐ Other: (describe) \_\_\_\_\_

This amendment *is* X *is not* \_\_\_\_\_ a contract renewal as allowed for in the existing contract.

All other provisions of said AGREEMENT shall remain in full force and effect.

Additionally, Contractor certifies that it is not included on the prohibited entities list published at <http://www.ogs.ny.gov/about/regs/docs/ListofEntities.pdf> as a result of the Iran Divestment Act of 2012 (Act), Chapter 1 of the 2012 Laws of New York. Under the Act, the Commissioner of the Office of General Services (OGS) has developed a list (prohibited entities list) of "persons" who are engaged in "investment activities in Iran" (both are defined terms in the law). Contractor (or any assignee) also certifies that it will not utilize on such Contract any subcontractor that is identified on the prohibited entities list.

Prior to this amendment, the contract value and period were:

\$ 1,500,000 From 2 / 1 / 21 to 1 / 31 / 22.  
(Value before amendment) (Initial start date)

This amendment provides the following modification (complete only items being modified):

\$ 2,915,247 From 2 / 1 / 21 to 1 / 31 / 23.

This will result in new contract terms of:

\$ 4,415,247 From 2 / 1 / 21 to 1 / 31 / 23.  
(All years thus far combined) (Initial start date) (Amendment end date)

Signature Page for:

Contract Number: C036361 Contractor: Fried, Frank, Harris, Shriver & Jacobson, LLP

Amendment Number: X- 1

BSC Unit ID: 3450000

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IN WITNESS WHEREOF, the parties hereto have executed this AGREEMENT as of the dates appearing under their signatures.

**CONTRACTOR SIGNATURE:**

By: [Signature]

(signature)

Date: 2/9/22

Printed Name: STEPHEN M. JURIS

Title: PARTNER

STATE OF NEW YORK

County of New York

} SS:

JOHN A. BOREK  
Notary Public, State of New York  
No. 02BO4782506  
Qualified in Queens County  
Commission Expires December 31, 2022

On the 9<sup>th</sup> day of February in the year 2022 before me, the undersigned, personally appeared Stephen M. Juris, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is(are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their/ capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

[Signature]  
(Signature and office of the individual taking acknowledgement)

-----  
**STATE AGENCY SIGNATURE**

"In addition to the acceptance of this contract, I also certify that original copies of this signature page will be attached to all other exact copies of this contract."

By: [Signature] Date: 2-15-2022

(signature)

Printed Name: Diane Christensen

Title: Dep Comm for Administration

-----  
**ATTORNEY GENERAL'S SIGNATURE**

By: \_\_\_\_\_

Date: \_\_\_\_\_

**STATE COMPTROLLER'S SIGNATURE**

By: \_\_\_\_\_

Date: \_\_\_\_\_

Revised 05/13/2014

<b>APPROVED</b> DEPT. OF AUDIT & CONTROL
Mar 15 2022 Brian Fuller
FOR THE STATE COMPTROLLER

## **C036361 Appendix C-1**

### **I. SERVICES TO BE PROVIDED**

The Department of Health ("DEPARTMENT" or "DOH") hereby engages the services of Fried, Frank, Harris, Shriver & Jacobson, LLP ("FRIED FRANK"). DOH requires assistance and representation in responding to multiple inquiries related to investigations of the State's COVID-19 response by law enforcement, governmental or regulatory bodies, and other offices with subpoena powers. This includes inquiries from the U.S. Attorney's Office for the Eastern District of New York, the New York County District Attorney's office, among others. This includes additional investigations, including but not limited to the publicly-reported investigations conducted by the New York State Office of the Attorney General, JCOPE, and the New York State Assembly. The Department's need for counsel includes legal guidance, advice, and representation regarding responding to governmental inquiries on this matter. The proposed services being procured from Fried Frank have not changed. However, there was significant expansion in the scope of the requests and work has been required on an expedited basis to supply documents to extensive requests and prepare witnesses. Additionally, while these investigations overlap to various degrees, they are not all identical – they have instead required independent review and document production involving various different issue areas and requests. Fried Frank's work otherwise continues to require consulting with the Department as to legal strategy, substance, and procedure; drafting and reviewing documents; legal research; fact research; witness interviews and preparation; assistance cooperating with law enforcement and other government requests and reviews; and in-depth document collection, review, and production, including e-Discovery-related tasks ("Legal Matters").

### **II. TERMS OF ENGAGEMENT**

DOH hereby engages FRIED FRANK to furnish legal services set forth in paragraph I of this Appendix for the period of February 1, 2021 to January 31, 2022 and has elected to renew the contract for the one-year renewal period of February 1, 2022 to January 31, 2023.

### **III. COMPENSATION**

For the services described in paragraph I, the DEPARTMENT will pay FRIED FRANK in an amount equal to charges incurred based upon the actual hours devoted to a particular matter multiplied by the following hourly rates:

Timekeeper Category	25% Discounted Rates 1/1/2021 to 12/31/2021	25% Discounted Rates 1/1/2022 to 12/31/2022
Partner A	\$1,000.00	\$1,000.00
Partner B	\$1,000.00	\$1,000.00
Premium Special Counsel	\$922.50	\$997.50
Special Counsel 1	\$911.25	\$986.25
Special Counsel 2	\$877.50	\$952.50
Associate: 9th Yr	\$828.75	\$888.75
Associate: 8th Yr	\$813.75	\$866.25
Associate: 7th Yr	\$791.25	\$843.75

Associate: 6th Yr	\$753.75	\$810.00
Associate: 5th Yr	\$727.50	\$776.25
Associate: 4th Yr	\$690.00	\$738.75
Associate: 3rd Yr	\$645.00	\$690.00
Associate: 2nd Yr	\$558.75	\$592.50
Associate: 1st Yr	\$480.00	\$517.50
Discovery Lawyer 1	\$307.50	\$371.25
Discovery Lawyer 2	\$258.75	\$330.00
Legal Assistant 1	\$352.50	\$371.25
Legal Assistant 2	\$311.25	\$330.00
Legal Assistant 3	\$288.75	\$307.50
Legal Assistant 4	\$240.00	\$255.00
Litigation Support 1	\$352.50	\$371.25
Litigation Support 2	\$322.50	\$341.25
Staff Attorney 1	\$408.75	\$431.25
Staff Attorney 2	\$270.00	\$285.00

These rates reflect a 25 percent discount in FRIED FRANK'S current legal rates, with the hourly rates for the two principal Partners working on this matter discounted further to \$1,000. The rates do not take into account Fried Frank's standard change in rates each calendar year. The rates for 2023 are not yet set. However, a 25 percent discount will continue to be applied for that year, if it is necessary. FRIED FRANK has also agreed that the Partners will need to continue to charge the existing \$1,000 partner rate/hour for the initial 1-year contract renewal in order to obtain renewal approval.

FRIED FRANK will be paid certain costs, other than attorney, paralegal, and staff time, incurred during representation. These reflect costs such as facsimile transmission, photocopying, overnight delivery, and messenger service. All charges are designed to recover the firm's actual cost of providing the services. For in-house services (e.g., photocopying, computer research), the DEPARTMENT is charged the direct cost of the service.

FRIED FRANK will be reimbursed for all reasonable travel, long distance telephone calls, printing, and other special expenses (transcript, subpoena fees, etc.) directly incurred in connection with furnishing services in this matter. Payment of such expenses, where applicable, shall be made pursuant to directives promulgated by the New York State Office of the State Comptroller applicable to Management/Confidential employees.

FRIED FRANK shall not be reimbursed for secretarial services and electronic research charges.

FRIED FRANK, subject to prior approval by the DEPARTMENT, may also engage outside vendors to assist in performing services, including the collection and processing of electronically stored information. The DEPARTMENT shall be responsible for payment of invoices issued by FRIED FRANK which reflect these disbursements.

FRIED FRANK may charge for their professional time, ancillary services and expenses, as well as fees and expenses of counsel incurred in preparing a response to a request for production of their files, with respect to their engagement with the DEPARTMENT, as authorized by the DEPARTMENT or as required by law.

#### IV. STAFF

FRIED FRANK shall assign Stephen Juris and Joshua Roth as the lead engagement partners, with assistance from senior and junior associates and in consultation with other partners.

## **V. GENERAL TERMS**

- A. FRIED FRANK hereby covenants and represents that there is and shall be no actual or potential conflict of interest that has not been otherwise waived by DOH that could prevent the firm's satisfactory or ethical performance of duties required to be performed pursuant to the terms of this AGREEMENT and any other contract or employment; and FRIED FRANK shall have a duty to notify DOH promptly, and in no event more than three business days after discovery, of any such actual or potential conflicts of interest in all that it does to serve the purpose of this AGREEMENT and its intent. If AGENCY determines that such representation conflicts or potentially conflicts with the Firm's continuing representation of AGENCY under this AGREEMENT, such a determination by AGENCY shall constitute a ground on which the AGENCY may terminate this AGREEMENT for cause, if AGENCY elects to do so.
- B. FRIED FRANK shall take all appropriate action to protect the confidentiality of all information supplied to it or developed by it during the course of its performance under the terms of this AGREEMENT.
- C. FRIED FRANK shall keep, maintain and/or make available all books, records and materials related to the performance and operation of this AGREEMENT for the audit and examination by authorized personnel of the Office of the State Comptroller of the State of New York at all reasonable times and places during the period of the execution of the AGREEMENT and for six (6) years from the date of the final payment hereunder.
- D. Opinions prepared by retained attorneys or law firms construing the statutes or Constitution of the State of New York do not constitute the opinion of the State unless the prior written approval of the Attorney General is obtained. Requests for said approval shall be submitted to the Solicitor General, Appeals and Opinions Bureau, Department of Law, State Capitol, Albany, New York.
- E. The retained attorney or law firm will represent the State of New York in judicial litigation related to the services to be provided under this agreement only when such services are specifically requested by the State agency's counsel and approved by the Attorney General. Such approval must be requested separately for each matter to be litigated and must be received prior to the commencement of services therefor.

MISCELLANEOUS/CONSULTANT SERVICES  
Face Page of State of New York Contract

STATE AGENCY (Name and Address):  
Department of Health  
Corning Tower  
Albany, NY 12237

NYS COMPTROLLER'S NUMBER: C036361  
ORIGINATING AGENCY GLBU: DOH01  
DEPARTMENT ID: 3450000

CONTRACTOR (Name and Address):  
Fried. Frank, Harris, Shriver & Jacobson, LLP  
1 New York Plaza  
New York, NY 10004

TYPE OF PROGRAM(S):  
Outside Counsel

CHARITIES REGISTRATION NUMBER:

CONTRACT TERM  
FROM: February 1, 2021  
TO: January 31, 2022  
FUNDING AMOUNT FOR CONTRACT TERM:  
not to exceed \$1,500,000

CONTRACTOR HAS ☐ HAS NOT ☐  
TIMELY FILED WITH THE ATTORNEY  
GENERAL'S CHARITIES BUREAU ALL  
REQUIRED PERIODIC OR ANNUAL  
WRITTEN REPORTS

FEDERAL TAX IDENTIFICATION NUMBER:  
13-5344867

NYS VENDOR IDENTIFICATON NUMBER  
1000013567

MUNICIPALITY NO. (if applicable)

STATUS:  
CONTRACTOR IS ☐ IS NOT ☒ A  
SECTARIAN ENTITY

CONTRACTOR IS ☐ IS NOT ☒ A NOT-FOR-  
PROFIT ORGANIZATION

CONTRACTOR IS ☒ IS NOT ☐ A NY STATE  
BUSINESS ENTERPRISE

☒ IF MARKED HERE, THIS CONTRACT MAY BE RENEWED FOR 1 ADDITIONAL YEAR  
PERIOD(S) SUBJECT TO APPROVAL OF THE OFFICE OF THE STATE COMPTROLLER.

BID OPENING DATE:

APPENDICES ATTACHED AND PART OF THIS CONTRACT. Precedence shall be given to these documents in the order listed below.

- |                                     |                                              |                                                                                                                                              |
|-------------------------------------|----------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------|
| <input checked="" type="checkbox"/> | APPENDIX A                                   | Standard Clauses as required by the Attorney General for all State Contracts                                                                 |
| <input checked="" type="checkbox"/> | APPENDIX X                                   | Contract Amendment Form (to accompany modified appendices for changes in term or consideration on an existing period or for renewal periods) |
| <input type="checkbox"/>            | APPENDIX Q                                   | Modification of Standard Department of Health Contract Language                                                                              |
| <input checked="" type="checkbox"/> | New York State Department of Health Contract |                                                                                                                                              |
| <input checked="" type="checkbox"/> | APPENDIX M                                   | Participation by Minority and Women-Owned Business Enterprises                                                                               |
| <input type="checkbox"/>            | APPENDIX B                                   | Request for Proposal (RFP) or Funding Availability Solicitation (FAS)                                                                        |
| <input checked="" type="checkbox"/> | APPENDIX C                                   | Proposal                                                                                                                                     |
| <input checked="" type="checkbox"/> | APPENDIX F                                   | Technology Terms and Conditions                                                                                                              |
| <input checked="" type="checkbox"/> | APPENDIX H                                   | Federal Health Insurance Portability and Accountability Act Business Associate Agreement                                                     |

IN WITNESS THEREOF, the parties hereto have executed or approved this Contract on the dates below their signature.

CONTRACTOR

Fried, Frank, Harris, Shriver & Jacobson, LLP

STATE AGENCY

New York State Department of Health

By: Stephen M. Juris

Printed Name

Title: Partner

Date: 5/25/21

By: Theresa Egan

Printed Name

Title: Asst Comm for Admin

Date: 6/3/21

State Agency Certification:

"In addition to the acceptance of this Contract, I also certify that original copies of this signature page will be attached to all other exact copies of this Contract."

STATE OF NEW YORK

County of Westchester )  
SS.:

On the 25<sup>th</sup> day of May in the year 2021 before me, the undersigned, personally appeared Stephen M. Juris, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is(are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

(Signature and office of the individual taking acknowledgement)

Notary Public

ATTORNEY GENERAL'S SIGNATURE

Title:

Date:

JOHN A. BOREK

Notary Public, State of New York

No. 02BO4782506

Qualified in Queens County

Certificate filed in New York County

Commission Expires December 31, 2021

NYS COMPTROLLER'S SIGNATURE

APPROVED

DEPT. OF AUDIT & CONTROL

Title:

Date:

Jul 14 2021

Brian Fuller

FOR THE STATE COMPTROLLER

**APPENDIX A**

**STANDARD CLAUSES FOR NEW YORK STATE CONTRACTS**

**PLEASE RETAIN THIS DOCUMENT  
FOR FUTURE REFERENCE.**



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**STANDARD CLAUSES FOR NYS CONTRACTS**

The parties to the attached contract, license, lease, amendment or other agreement of any kind (hereinafter, "the contract" or "this contract") agree to be bound by the following clauses which are hereby made a part of the contract (the word "Contractor" herein refers to any party other than the State, whether a contractor, licensor, licensee, lessor, lessee or any other party):

**1. EXECUTORY CLAUSE.** In accordance with Section 41 of the State Finance Law, the State shall have no liability under this contract to the Contractor or to anyone else beyond funds appropriated and available for this contract.

**2. NON-ASSIGNMENT CLAUSE.** In accordance with Section 138 of the State Finance Law, this contract may not be assigned by the Contractor or its right, title or interest therein assigned, transferred, conveyed, sublet or otherwise disposed of without the State's previous written consent, and attempts to do so are null and void. Notwithstanding the foregoing, such prior written consent of an assignment of a contract let pursuant to Article XI of the State Finance Law may be waived at the discretion of the contracting agency and with the concurrence of the State Comptroller where the original contract was subject to the State Comptroller's approval, where the assignment is due to a reorganization, merger or consolidation of the Contractor's business entity or enterprise. The State retains its right to approve an assignment and to require that any Contractor demonstrate its responsibility to do business with the State. The Contractor may, however, assign its right to receive payments without the State's prior written consent unless this contract concerns Certificates of Participation pursuant to Article 5-A of the State Finance Law.

**3. COMPTROLLER'S APPROVAL.** In accordance with Section 112 of the State Finance Law (or, if this contract is with the State University or City University of New York, Section 355 or Section 6218 of the Education Law), if this contract exceeds \$50,000 (or the minimum thresholds agreed to by the Office of the State Comptroller for certain S.U.N.Y. and C.U.N.Y. contracts), or if this is an amendment for any amount to a contract which, as so amended, exceeds said statutory amount, or if, by this contract, the State agrees to give something other than money when the value or reasonably estimated value of such consideration exceeds \$25,000, it shall not be valid, effective or binding upon the State until it has been approved by the State Comptroller and filed in his office. Comptroller's approval of contracts let by the Office of General Services is required when such contracts exceed \$85,000 (State Finance Law § 163.6-a). However, such pre-approval shall not be required for any contract established as a centralized contract through the Office of General Services or for a purchase order or other transaction issued under such centralized contract.

**4. WORKERS' COMPENSATION BENEFITS.** In accordance with Section 142 of the State Finance Law, this contract shall be void and of no force and effect unless the Contractor shall provide and maintain coverage during the life of this contract for the benefit of such employees as are required to be covered by the provisions of the Workers' Compensation Law.

**5. NON-DISCRIMINATION REQUIREMENTS.** To the extent required by Article 15 of the Executive Law (also known as the Human Rights Law) and all other State and Federal statutory and constitutional non-discrimination provisions, the Contractor will not discriminate against any employee or applicant for employment, nor subject any individual to harassment, because of age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or domestic violence victim status or because the individual has opposed any practices forbidden under the Human Rights Law or has filed a complaint, testified, or assisted in any proceeding under the Human Rights Law. Furthermore, in accordance with Section 220-e of the Labor Law, if this is a contract for the construction, alteration or repair of any public building or public work or for the manufacture, sale or distribution of materials, equipment or supplies, and to the extent that this contract shall be performed within the State of New York, Contractor agrees that neither it nor its subcontractors shall, by reason of race, creed, color, disability, sex, or national origin: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this contract. If this is a building service contract as defined in Section 230 of the Labor Law, then, in accordance with Section 239 thereof, Contractor agrees that neither it nor its subcontractors shall by reason of race, creed, color, national origin, age, sex or disability: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this contract. Contractor is subject to fines of \$50.00 per person per day for any violation of Section 220-e or Section 239 as well as possible termination of this contract and forfeiture of all moneys due hereunder for a second or subsequent violation.

**6. WAGE AND HOURS PROVISIONS.** If this is a public work contract covered by Article 8 of the Labor Law or a building service contract covered by Article 9 thereof, neither Contractor's employees nor the employees of its subcontractors may be required or permitted to work more than the number of hours or days stated in said statutes, except as otherwise provided

in the Labor Law and as set forth in prevailing wage and supplement schedules issued by the State Labor Department. Furthermore, Contractor and its subcontractors must pay at least the prevailing wage rate and pay or provide the prevailing supplements, including the premium rates for overtime pay, as determined by the State Labor Department in accordance with the Labor Law. Additionally, effective April 28, 2008, if this is a public work contract covered by Article 8 of the Labor Law, the Contractor understands and agrees that the filing of payrolls in a manner consistent with Subdivision 3-a of Section 220 of the Labor Law shall be a condition precedent to payment by the State of any State approved sums due and owing for work done upon the project.

**7. NON-COLLUSIVE BIDDING CERTIFICATION.** In accordance with Section 139-d of the State Finance Law, if this contract was awarded based upon the submission of bids, Contractor affirms, under penalty of perjury, that its bid was arrived at independently and without collusion aimed at restricting competition. Contractor further affirms that, at the time Contractor submitted its bid, an authorized and responsible person executed and delivered to the State a non-collusive bidding certification on Contractor's behalf.

**8. INTERNATIONAL BOYCOTT PROHIBITION.** In accordance with Section 220-f of the Labor Law and Section 139-h of the State Finance Law, if this contract exceeds \$5,000, the Contractor agrees, as a material condition of the contract, that neither the Contractor nor any substantially owned or affiliated person, firm, partnership or corporation has participated, is participating, or shall participate in an international boycott in violation of the federal Export Administration Act of 1979 (50 USC App. Sections 2401 et seq.) or regulations thereunder. If such Contractor, or any of the aforesaid affiliates of Contractor, is convicted or is otherwise found to have violated said laws or regulations upon the final determination of the United States Commerce Department or any other appropriate agency of the United States subsequent to the contract's execution, such contract, amendment or modification thereto shall be rendered forfeit and void. The Contractor shall so notify the State Comptroller within five (5) business days of such conviction, determination or disposition of appeal (2 NYCRR § 105.4).

**9. SET-OFF RIGHTS.** The State shall have all of its common law, equitable and statutory rights of set-off. These rights shall include, but not be limited to, the State's option to withhold for the purposes of set-off any moneys due to the Contractor under this contract up to any amounts due and owing to the State with regard to this contract, any other contract with any State department or agency, including any contract for a term commencing prior to the term of this contract, plus any amounts due and owing to the State for any other reason including, without limitation, tax delinquencies, fee delinquencies or monetary penalties relative thereto. The State shall exercise its set-off rights in accordance with normal State practices including, in cases of set-off pursuant to an audit, the finalization of such audit by the State agency, its representatives, or the State Comptroller.

**10. RECORDS.** The Contractor shall establish and maintain complete and accurate books, records, documents, accounts and other evidence directly pertinent to performance under this contract (hereinafter, collectively, the "Records"). The Records must be kept for the balance of the calendar year in which they were made and for six (6) additional years thereafter. The State Comptroller, the Attorney General and any other person or entity authorized to conduct an examination, as well as the agency or agencies involved in this contract, shall have access to the Records during normal business hours at an office of the Contractor within the State of New York or, if no such office is available, at a mutually agreeable and reasonable venue within the State, for the term specified above for the purposes of inspection, auditing and copying. The State shall take reasonable steps to protect from public disclosure any of the Records which are exempt from disclosure under Section 87 of the Public Officers Law (the "Statute") provided that: (i) the Contractor shall timely inform an appropriate State official, in writing, that said records should not be disclosed; and (ii) said records shall be sufficiently identified; and (iii) designation of said records as exempt under the Statute is reasonable. Nothing contained herein shall diminish, or in any way adversely affect, the State's right to discovery in any pending or future litigation.

**11. IDENTIFYING INFORMATION AND PRIVACY NOTIFICATION.** (a) Identification Number(s). Every invoice or New York State Claim for Payment submitted to a New York State agency by a payee, for payment for the sale of goods or services or for transactions (e.g., leases, easements, licenses, etc.) related to real or personal property must include the payee's identification number. The number is any or all of the following: (i) the payee's Federal employer identification number, (ii) the payee's Federal social security number, and/or (iii) the payee's Vendor Identification Number assigned by the Statewide Financial System. Failure to include such number or numbers may delay payment. Where the payee does not have such number or numbers, the payee, on its invoice or Claim for Payment, must give the reason or reasons why the payee does not have such number or numbers.

(b) Privacy Notification. (1) The authority to request the above personal information from a seller of goods or services or a lessor of real or personal property, and the authority to maintain such information, is found in Section 5 of the State Tax

Law. Disclosure of this information by the seller or lessor to the State is mandatory. The principal purpose for which the information is collected is to enable the State to identify individuals, businesses and others who have been delinquent in filing tax returns or may have understated their tax liabilities and to generally identify persons affected by the taxes administered by the Commissioner of Taxation and Finance. The information will be used for tax administration purposes and for any other purpose authorized by law. (2) The personal information is requested by the purchasing unit of the agency contracting to purchase the goods or services or lease the real or personal property covered by this contract or lease. The information is maintained in the Statewide Financial System by the Vendor Management Unit within the Bureau of State Expenditures, Office of the State Comptroller, 110 State Street, Albany, New York 12236.

**12. EQUAL EMPLOYMENT OPPORTUNITIES FOR MINORITIES AND WOMEN.** In accordance with Section 312 of the Executive Law and 5 NYCRR Part 143, if this contract is: (i) a written agreement or purchase order instrument, providing for a total expenditure in excess of \$25,000.00, whereby a contracting agency is committed to expend or does expend funds in return for labor, services, supplies, equipment, materials or any combination of the foregoing, to be performed for, or rendered or furnished to the contracting agency; or (ii) a written agreement in excess of \$100,000.00 whereby a contracting agency is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon; or (iii) a written agreement in excess of \$100,000.00 whereby the owner of a State assisted housing project is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon for such project, then the following shall apply and by signing this agreement the Contractor certifies and affirms that it is Contractor's equal employment opportunity policy that:

(a) The Contractor will not discriminate against employees or applicants for employment because of race, creed, color, national origin, sex, age, disability or marital status, shall make and document its conscientious and active efforts to employ and utilize minority group members and women in its work force on State contracts and will undertake or continue existing programs of affirmative action to ensure that minority group members and women are afforded equal employment opportunities without discrimination. Affirmative action shall mean recruitment, employment, job assignment, promotion, upgradings, demotion, transfer, layoff, or termination and rates of pay or other forms of compensation;

(b) at the request of the contracting agency, the Contractor shall request each employment agency, labor union, or authorized representative of workers with which it has a collective bargaining or other agreement or understanding, to furnish a written statement that such employment agency, labor union or representative will not discriminate on the basis of race, creed, color, national origin, sex, age, disability or marital status and that such union or representative will affirmatively cooperate in the implementation of the Contractor's obligations herein; and

(c) the Contractor shall state, in all solicitations or advertisements for employees, that, in the performance of the State contract, all qualified applicants will be afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status.

Contractor will include the provisions of "a," "b," and "c" above, in every subcontract over \$25,000.00 for the construction, demolition, replacement, major repair, renovation, planning or design of real property and improvements thereon (the "Work") except where the Work is for the beneficial use of the Contractor. Section 312 does not apply to: (i) work, goods or services unrelated to this contract; or (ii) employment outside New York State. The State shall consider compliance by a contractor or subcontractor with the requirements of any federal law concerning equal employment opportunity which effectuates the purpose of this clause. The contracting agency shall determine whether the imposition of the requirements of the provisions hereof duplicate or conflict with any such federal law and if such duplication or conflict exists, the contracting agency shall waive the applicability of Section 312 to the extent of such duplication or conflict. Contractor will comply with all duly promulgated and lawful rules and regulations of the Department of Economic Development's Division of Minority and Women's Business Development pertaining hereto.

**13. CONFLICTING TERMS.** In the event of a conflict between the terms of the contract (including any and all attachments thereto and amendments thereof) and the terms of this Appendix A, the terms of this Appendix A shall control.

**14. GOVERNING LAW.** This contract shall be governed by the laws of the State of New York except where the Federal supremacy clause requires otherwise.

**15. LATE PAYMENT.** Timeliness of payment and any interest to be paid to Contractor for late payment shall be governed by Article 11-A of the State Finance Law to the extent required by law.

**16. NO ARBITRATION.** Disputes involving this contract, including the breach or alleged breach thereof, may not be submitted to binding arbitration (except where statutorily authorized), but must, instead, be heard in a court of competent jurisdiction of the State of New York.

**17. SERVICE OF PROCESS.** In addition to the methods of service allowed by the State Civil Practice Law & Rules ("CPLR"), Contractor hereby consents to service of process upon it by registered or certified mail, return receipt requested. Service hereunder shall be complete upon Contractor's actual receipt of process or upon the State's receipt of the return thereof by the United States Postal Service as refused or undeliverable. Contractor must promptly notify the State, in writing, of each and every change of address to which service of process can be made. Service by the State to the last known address shall be sufficient. Contractor will have thirty (30) calendar days after service hereunder is complete in which to respond.

**18. PROHIBITION ON PURCHASE OF TROPICAL HARDWOODS.** The Contractor certifies and warrants that all wood products to be used under this contract award will be in accordance with, but not limited to, the specifications and provisions of Section 165 of the State Finance Law, (Use of Tropical Hardwoods) which prohibits purchase and use of tropical hardwoods, unless specifically exempted, by the State or any governmental agency or political subdivision or public benefit corporation. Qualification for an exemption under this law will be the responsibility of the contractor to establish to meet with the approval of the State.

In addition, when any portion of this contract involving the use of woods, whether supply or installation, is to be performed by any subcontractor, the prime Contractor will indicate and certify in the submitted bid proposal that the subcontractor has been informed and is in compliance with specifications and provisions regarding use of tropical hardwoods as detailed in § 165 State Finance Law. Any such use must meet with the approval of the State; otherwise, the bid may not be considered responsive. Under bidder certifications, proof of qualification for exemption will be the responsibility of the Contractor to meet with the approval of the State.

**19. MACBRIDE FAIR EMPLOYMENT PRINCIPLES.** In accordance with the MacBride Fair Employment Principles (Chapter 807 of the Laws of 1992), the Contractor hereby stipulates that the Contractor either (a) has no business operations in Northern Ireland, or (b) shall take lawful steps in good faith to conduct any business operations in Northern Ireland in accordance with the MacBride Fair Employment Principles (as described in Section 165 of the New York State Finance Law), and shall permit independent monitoring of compliance with such principles.

**20. OMNIBUS PROCUREMENT ACT OF 1992.** It is the policy of New York State to maximize opportunities for the participation of New York State business enterprises, including minority- and women-owned business enterprises as bidders, subcontractors and suppliers on its procurement contracts.

Information on the availability of New York State subcontractors and suppliers is available from:

NYS Department of Economic Development  
Division for Small Business  
Albany, New York 12245  
Telephone: 518-292-5100  
Fax: 518-292-5884  
email: [opa@esd.ny.gov](mailto:opa@esd.ny.gov)

A directory of certified minority- and women-owned business enterprises is available from:

NYS Department of Economic Development  
Division of Minority and Women's Business Development  
633 Third Avenue  
New York, NY 10017  
212-803-2414  
email: [mwbecertification@esd.ny.gov](mailto:mwbecertification@esd.ny.gov)  
<https://ny.newnycontracts.com/FrontEnd/VendorSearchPublic.asp>

The Omnibus Procurement Act of 1992 (Chapter 844 of the Laws of 1992, codified in State Finance Law § 139-i and Public Authorities Law § 2879(3)(n)-(p)) requires that by signing this bid proposal or contract, as applicable, Contractors certify that whenever the total bid amount is greater than \$1 million:

(a) The Contractor has made reasonable efforts to encourage the participation of New York State Business Enterprises as suppliers and subcontractors, including certified minority- and women-owned business enterprises, on this project, and has retained the documentation of these efforts to be provided upon request to the State;

(b) The Contractor has complied with the Federal Equal Opportunity Act of 1972 (P.L. 92-261), as amended;

(c) The Contractor agrees to make reasonable efforts to provide notification to New York State residents of employment opportunities on this project through listing any such positions with the Job Service Division of the New York State Department of Labor, or providing such notification in such manner as is consistent with existing collective bargaining contracts or agreements. The Contractor agrees to document these efforts and to provide said documentation to the State upon request; and

(d) The Contractor acknowledges notice that the State may seek to obtain offset credits from foreign countries as a result of this contract and agrees to cooperate with the State in these efforts.

**21. RECIPROCITY AND SANCTIONS PROVISIONS.** Bidders are hereby notified that if their principal place of business is located in a country, nation, province, state or political subdivision that penalizes New York State vendors, and if the goods or services they offer will be substantially produced or performed outside New York State, the Omnibus Procurement Act 1994 and 2000 amendments (Chapter 684 and Chapter 383, respectively, codified in State Finance Law § 165(6) and Public Authorities Law § 2879(5)) require that they be denied contracts which they would otherwise obtain. NOTE: As of October 2019, the list of discriminatory jurisdictions subject to this provision includes the states of South Carolina, Alaska, West Virginia, Wyoming, Louisiana and Hawaii.

**22. COMPLIANCE WITH BREACH NOTIFICATION AND DATA SECURITY LAWS.** Contractor shall comply with the provisions of the New York State Information Security Breach and Notification Act (General Business Law § 899-aa and State Technology Law § 208) and commencing March 21, 2020 shall also comply with General Business Law § 899-bb.

**23. COMPLIANCE WITH CONSULTANT DISCLOSURE LAW.** If this is a contract for consulting services, defined for purposes of this requirement to include analysis, evaluation, research, training, data processing, computer programming, engineering, environmental, health, and mental health services, accounting, auditing, paralegal, legal or similar services, then, in accordance with Section 163 (4)(g) of the State Finance Law (as amended by Chapter 10 of the Laws of 2006), the Contractor shall timely, accurately and properly comply with the requirement to submit an annual employment report for the contract to the agency that awarded the contract, the Department of Civil Service and the State Comptroller.

**24. PROCUREMENT LOBBYING.** To the extent this agreement is a "procurement contract" as defined by State Finance Law §§ 139-j and 139-k, by signing this agreement the contractor certifies and affirms that all disclosures made in accordance with State Finance Law §§ 139-j and 139-k are complete, true and accurate. In the event such certification is found to be intentionally false or intentionally incomplete, the State may terminate the agreement by providing written notification to the Contractor in accordance with the terms of the agreement.

**25. CERTIFICATION OF REGISTRATION TO COLLECT SALES AND COMPENSATING USE TAX BY CERTAIN STATE CONTRACTORS, AFFILIATES AND SUBCONTRACTORS.**

To the extent this agreement is a contract as defined by Tax Law § 5-a, if the contractor fails to make the certification required by Tax Law § 5-a or if during the term of the contract, the Department of Taxation and Finance or the covered agency, as defined by Tax Law § 5-a, discovers that the certification, made under penalty of perjury, is false, then such failure to file or false certification shall be a material breach of this contract and this contract may be terminated, by providing written notification to the Contractor in accordance with the terms of the agreement, if the covered agency determines that such action is in the best interest of the State.

**26. IRAN DIVESTMENT ACT.** By entering into this Agreement, Contractor certifies in accordance with State Finance Law § 165-a that it is not on the "Entities Determined to be Non-Responsive Bidders/Offerers pursuant to the New York State Iran Divestment Act of 2012" ("Prohibited Entities List") posted at: <https://ogs.ny.gov/list-entities-determined-be-non-responsive-biddersofferers-pursuant-nys-iran-divestment-act-2012>

Contractor further certifies that it will not utilize on this Contract any subcontractor that is identified on the Prohibited Entities List. Contractor agrees that should it seek to renew or extend this Contract, it must provide the same certification at the

time the Contract is renewed or extended. Contractor also agrees that any proposed Assignee of this Contract will be required to certify that it is not on the Prohibited Entities List before the contract assignment will be approved by the State.

During the term of the Contract, should the state agency receive information that a person (as defined in State Finance Law § 165-a) is in violation of the above-referenced certifications, the state agency will review such information and offer the person an opportunity to respond. If the person fails to demonstrate that it has ceased its engagement in the investment activity which is in violation of the Act within 90 days after the determination of such violation, then the state agency shall take such action as may be appropriate and provided for by law, rule, or contract, including, but not limited to, imposing sanctions, seeking compliance, recovering damages, or declaring the Contractor in default.

The state agency reserves the right to reject any bid, request for assignment, renewal or extension for an entity that appears on the Prohibited Entities List prior to the award, assignment, renewal or extension of a contract, and to pursue a responsibility review with respect to any entity that is awarded a contract and appears on the Prohibited Entities list after contract award.

**27. ADMISSIBILITY OF REPRODUCTION OF CONTRACT.** Notwithstanding the best evidence rule or any other legal principle or rule of evidence to the contrary, the Contractor acknowledges and agrees that it waives any and all objections to the admissibility into evidence at any court proceeding or to the use at any examination before trial of an electronic reproduction of this contract, in the form approved by the State Comptroller, if such approval was required, regardless of whether the original of said contract is in existence.

**APPENDIX X  
CONTRACT AMENDMENT FORM  
ORIGINATING AGENCY: DOH01**

Contract Number: \_\_\_\_\_

CONTRACTOR: \_\_\_\_\_

Amendment Number X-\_\_\_\_\_

BSC Unit ID: 3450000

This is a Contract between THE STATE OF NEW YORK, acting by and through NYS Department of Health, having its principal office at Albany, New York, (hereinafter referred to as the DEPARTMENT), and \_\_\_\_\_ (hereinafter referred to as the CONTRACTOR), having its mailing address at \_\_\_\_\_, for amendment of this Contract.

This amendment makes the following changes to the Contract (check all that apply):

- \_\_\_\_\_ Modifies the Contract period at no additional cost
- \_\_\_\_\_ Modifies the Contract period at additional cost
- \_\_\_\_\_ Modifies the budget or payment terms
- \_\_\_\_\_ Modifies the work plan or deliverables
- \_\_\_\_\_ Replaces appendix(es) \_\_\_\_\_ with the attached appendix(es) \_\_\_\_\_
- \_\_\_\_\_ Adds the attached appendix(es) \_\_\_\_\_
- \_\_\_\_\_ Other: (describe) \_\_\_\_\_

This amendment *is*    *is not*    a Contract renewal as allowed for in the existing Contract.

All other provisions of said Contract shall remain in full force and effect.

Additionally, CONTRACTOR certifies that it is not included on the prohibited entities list published at <http://www.ogs.ny.gov/about/regs/docs/ListofEntities.pdf> as a result of the Iran Divestment Act of 2012 (Act), Chapter 1 of the 2012 Laws of New York. Under the Act, the Commissioner of the Office of General Services (OGS) has developed a list (prohibited entities list) of "persons" who are engaged in "investment activities in Iran" (both are defined terms in the law). CONTRACTOR (or any assignee) also certifies that it will not utilize on such Contract in any subcontracts that is identified on the prohibited entities list.

Prior to this amendment, the Contract value and period were:

\$ \_\_\_\_\_  
(Value before amendment)

From   /  /   to   /  /  .  
(Initial Start date)

This amendment provides the following modification (complete only items being modified):

\$ \_\_\_\_\_

From   /  /   to   /  /  .

This will result in new Contract terms of:

\$ \_\_\_\_\_  
(All years thus far combined)

From   /  /   to   /  /  .  
(Initial Start date) (Amendment end date)



Signature Page for:

Contract Number: \_\_\_\_\_

CONTRACTOR: \_\_\_\_\_

Amendment Number X- \_\_\_\_\_

Unit ID: 34500000 \_\_\_\_\_

IN WITNESS WHEREOF, the parties hereto have executed this Contract as of the dates appearing under their signatures.

**CONTRACTOR SIGNATURE:**

By: \_\_\_\_\_  
(signature)

Date: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

STATE OF NEW YORK

County of \_\_\_\_\_

)

)

SS:

On the \_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ before me, the undersigned, personally appeared \_\_\_\_\_, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is(are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their/ capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

\_\_\_\_\_  
(Signature and office of the individual taking acknowledgement)

**STATE AGENCY SIGNATURE**

"In addition to the acceptance of this Contract, I also certify that original copies of this signature page will be attached to all other exact copies of this Contract."

By: \_\_\_\_\_  
(signature)

Date: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

**ATTORNEY GENERAL'S SIGNATURE**

By: \_\_\_\_\_

Date: \_\_\_\_\_

**STATE COMPTROLLER'S SIGNATURE**

By: \_\_\_\_\_

Date: \_\_\_\_\_

## NEW YORK STATE DEPARTMENT OF HEALTH CONTRACT

This Contract is made by and between the New York State Department of Health (DEPARTMENT) and the CONTRACTOR identified on the face page.

### WITNESSETH:

- ☐ **WHEREAS**, the DEPARTMENT has formally requested vendors to submit bid proposals for the project described in Appendix B for which bids were opened on the date noted on the face pages of this Contract; and the DEPARTMENT has determined that the CONTRACTOR is the successful bidder, and the CONTRACTOR covenants that it is willing and able to undertake the services and provide the necessary materials, labor and equipment;
- ☒ **WHEREAS**, the DEPARTMENT has determined, without a formal bid proposal, that it is in need of the services described in Appendix C; and the CONTRACTOR covenants that it is willing and able to undertake the services and provide the necessary materials, labor and equipment in connection therewith;

NOW THEREFORE, in consideration of the terms, promises, responsibilities, and covenants set forth below the parties agree as follows:

### I. General Terms and Conditions

- A. This Contract incorporates the face pages attached and all of the marked appendices identified on the face page.
- B. The maximum compensation for the Contract term of this Contract shall not exceed the amount specified on the face page.
- C. This Contract may be renewed for an additional period (PERIOD), as specified on the face page.
- D. To amend or exercise any renewal option of this Contract, the parties shall prepare new appendices, to the extent that any require modification, and a Contract Amendment Form in the format provided by the DEPARTMENT (Appendix X). Any terms of this Contract not modified shall remain in effect for each PERIOD of the Contract. The Contract Amendment Form is subject to the approval of the Office of the State Comptroller. This Contract may not be amended orally. The CONTRACTOR shall not make any changes in the scope of work at any time without prior authorization in writing from the DEPARTMENT and without prior approval in writing of the amount of compensation for such changes.
- E. Appendix A (Standard Clauses as required by the Attorney General for all State Contracts) takes precedence over all other parts of the Contract.
- F. For the purposes of this Contract, the term "Proposal" includes all Appendix C documents as marked on the face page.

- G. The CONTRACTOR is an independent contractor and may neither hold itself out nor claim to be an officer, employee or subdivision of the DEPARTMENT nor make any claims, demand or application to or for any right based upon any different status.
- H. The CONTRACTOR agrees, throughout the term of this Contract, to maintain, at CONTRACTOR'S expense, those benefits to which its employees are entitled by law, including health benefits, any necessary insurance for its employees, including professional liability, worker's compensation, disability and unemployment insurance, and to provide the DEPARTMENT with certification of such insurance upon request. The CONTRACTOR remains responsible for all applicable federal, state, and local taxes, and all FICA contributions.
- I. For the purposes of this Contract, the Appendix B includes all Request for Proposal (RFP) or Funding Availability Solicitation (FAS) documents including questions and answer documents, amendments and attachments.
- J. CONTRACTOR is under an affirmative duty to be informed by personal examination of the specifications and location of the proposed work and by such other means as it may select, of character, quality and extent of work to be performed and the conditions under which the Contract is to be executed.
- K. The DEPARTMENT will make no allowance or concession to a CONTRACTOR for any alleged misunderstanding or deception because of quantity, quality, character, location or other conditions.
- L. The CONTRACTOR shall have a representative to provide supervision of the work which CONTRACTOR employees are performing to ensure complete and satisfactory performance with the terms of this Contract. This representative shall also be authorized to receive and put into effect promptly all orders, directions and instructions from the DEPARTMENT. A confirmation in writing of such orders or directions will be given by the DEPARTMENT when so requested from the CONTRACTOR.
- M. If the DEPARTMENT is of the opinion that the services required by the specifications cannot satisfactorily be performed because of insufficiency of personnel, the DEPARTMENT shall have the authority to require the CONTRACTOR to use such additional personnel, to take such steps necessary to perform the services satisfactorily at no additional cost to the DEPARTMENT.
- N. The DEPARTMENT shall conduct any inspection at a time during normal business hours where the activities of the work under this Contract are taking place and in a manner so as not to unreasonably disrupt the CONTRACTOR'S business. During its inspection the DEPARTMENT may view and audit any materials related to this Contract.
- O. No failure by the DEPARTMENT at any time to give notice of any breach by the other party of, or to require compliance with, any condition or provision of this Contract shall be deemed a waiver of similar or dissimilar provisions or conditions at the same or at any prior or subsequent time.

## **II. Payment and Reporting**

- A. The CONTRACTOR shall submit complete and accurate invoices and/or vouchers, together with supporting documentation required by this Contract, the DEPARTMENT and the State Comptroller, to the DEPARTMENT'S designated payment office in order to receive payment to one of the following addresses:
  - 1. Preferred Method: Email a .pdf copy of your signed voucher to the BSC at: [accountspayable@ogs.ny.gov](mailto:accountspayable@ogs.ny.gov) with a subject field as follows:

Subject: **Unit ID:** 3450231

(Note: **Do not** send a paper copy in addition to your emailed voucher.)

2. Alternate Method: Mail vouchers to Business Service Center at the following U.S. postal address:

**NYS Department of Health**

**Unit ID:** 3450231

**Building 5, 5<sup>th</sup> Floor 1220 Washington Ave  
Albany, NY 12226-1900**

- B. Payment of such invoices and/or vouchers by the DEPARTMENT shall be made in accordance with Article XI-A of the New York State Finance Law.

Payment for invoices and/or vouchers submitted by the CONTRACTOR shall only be rendered electronically unless payment by paper check is expressly authorized by the Commissioner, in the Commissioner's sole discretion, due to extenuating circumstances. Such electronic payment shall be made in accordance with ordinary DEPARTMENT procedures and practices. The CONTRACTOR shall comply with the State Comptroller's procedures to authorize electronic payments. Authorization forms are available at the State Comptroller's website at [www.osc.state.ny.us/epay/index.htm](http://www.osc.state.ny.us/epay/index.htm), by email at [helpdesk@sfs.ny.gov](mailto:helpdesk@sfs.ny.gov), or by telephone at 1-855-233-8363. CONTRACTOR acknowledges that it will not receive payment on any invoices and/or vouchers submitted under this Contract if it does not comply with the State Comptroller's electronic payment procedures, except where the Commissioner has expressly authorized payment by paper check as set forth above.

In addition to the Electronic Payment Authorization Form, a Substitute Form W-9 must be on file with the Office of the State Comptroller, Bureau of Accounting Operations. Additional information and procedures for enrollment can be found at <http://www.osc.state.ny.us/vendors/vendorguide/guide.htm>.

Payment terms shall be:

The law firm Fried, Frank, Harris, Shriver & Jacobson LLP ("FRIED FRANK") will provide legal representation of the NYS Department of Health ("DEPARTMENT"). See Appendix C for details.

### **III. Term and Termination**

- A. Upon approval of the Office of the State Comptroller this Contract shall be effective for the term as specified on the face page.
- B. This Contract may be terminated by mutual written agreement of the Contracting parties.
- C. This Contract may be terminated by the DEPARTMENT for cause upon the failure of the CONTRACTOR to comply with the terms and conditions of this Contract, including the attachments hereto, provided that the DEPARTMENT shall give the CONTRACTOR written notice via registered or certified mail, return receipt requested, or shall deliver same by hand-receiving CONTRACTOR'S receipt therefore, such written notice to specify the CONTRACTOR'S failure and the termination of this Contract. Termination shall be effective ten (10) business days from receipt of such notice, established by the receipt returned to the DEPARTMENT. The CONTRACTOR agrees to incur no new obligations nor to claim for any expenses made after receipt of the notification of termination.
- D. This Contract may be deemed terminated immediately at the option of the DEPARTMENT upon the filing of a petition in bankruptcy or insolvency, by or against the CONTRACTOR. Such termination shall be immediate and complete, without termination costs or further obligations by the DEPARTMENT to the CONTRACTOR.
- E. The DEPARTMENT reserves the right to stop the work being performed under this Contract at any time that the DEPARTMENT deems the CONTRACTOR to be unwilling or unable to perform the work to the satisfaction of the DEPARTMENT. In the event of such cessation of work, and where the CONTRACTOR has been afforded an opportunity to cure its inability to adequately perform within a reasonable time as specified by the DEPARTMENT, but not to exceed 30 days, and the CONTRACTOR has failed to remedy such defect of performance to the satisfaction of the DEPARTMENT, the DEPARTMENT shall have the right to terminate this Contract and to arrange for the completion of the work in such manner as the DEPARTMENT may deem advisable; and if the cost of having the work completed by a replacement CONTRACTOR exceeds the amount of the initially-awarded Contract, the CONTRACTOR and its surety shall be liable to the DEPARTMENT for any excess cost on account thereof.
- F. This Contract may be canceled at any time by the DEPARTMENT giving to the CONTRACTOR not less than 30 days written notice that on or after a date therein specified this Contract shall be deemed terminated and canceled.

#### G. Provisions Upon Default

1. In the event that the CONTRACTOR, through any cause, fails to perform any of the terms, covenants or promises of this Contract, the DEPARTMENT thereupon shall have the right to terminate this Contract by giving notice in writing of the fact and date of such termination to the CONTRACTOR.
2. If, in the judgment of the DEPARTMENT, the CONTRACTOR acts in such a way which is likely to or does impair or prejudice the interests of the DEPARTMENT, the DEPARTMENT shall thereupon have the right to terminate this Contract by giving notice in writing of the fact and date of such termination to the CONTRACTOR. The CONTRACTOR shall receive equitable compensation for such services as shall, in the judgment of the State Comptroller, have been satisfactorily performed by the CONTRACTOR prior to the effective date of termination of this Contract, such compensation shall not exceed the total cost incurred for the work which the CONTRACTOR was engaged in at the time of termination, subject to audit by the State Comptroller.

#### H. Upon termination of this Contract, the following shall occur:

1. CONTRACTOR shall make available to the DEPARTMENT for examination all data, records and reports relating to this Contract;
2. Except as otherwise provided in this Contract, the liability of the DEPARTMENT for payments to the CONTRACTOR and the liability of the CONTRACTOR for services hereunder shall cease.

#### IV. Contract Insurance Requirements

- A. Prior to the start of work under this Contract, the CONTRACTOR shall procure at its sole cost and expense, and shall maintain in force at all times during the term of this Contract, insurance of the types and in the amounts as herein below set forth, written by companies authorized by the New York State Department of Financial Services to issue insurance in the State of New York ("admitted" carriers) with an A.M. Best Company rating of "A-" or better or as acceptable to the DEPARTMENT. Before commencing performance of the work, the CONTRACTOR shall deliver to the DEPARTMENT evidence of such policies in a form acceptable to the DEPARTMENT. These policies must be written in accordance with the requirements of the paragraphs below, as applicable. The DEPARTMENT may, at its sole discretion, accept policies of insurance written by a non-authorized carrier or carriers when Certificates and/or other policy documentation is accompanied by a completed Excess Lines Association of New York (ELANY) Affidavit; provided that nothing herein shall be construed to require the DEPARTMENT to accept insurance placed with a non-authorized carrier under any circumstances.
- B. Conditions Applicable to Insurance. All policies of insurance required by this Contract must meet the following requirements:
1. **Coverage Types and Policy Limits.** The types of coverage and policy limits required from the CONTRACTOR are specified in subsection C Specific Coverages and Limits of this section.
  2. **Policy Forms.** Except as may be otherwise specifically provided herein or agreed in writing by the DEPARTMENT, policies must be written on an occurrence basis. Under certain circumstance, the DEPARTMENT may elect to accept policies written on a claims-made basis provided that, at a minimum, the policy remains in force throughout the performance of the services and for three (3) years after completion of the Contract. If the policy is cancelled or not renewed during that time, the CONTRACTOR must purchase at its sole expense Discovery Clause coverage sufficient to complete the 3-year period after completion of the Contract. Written proof of this extended reporting period must be provided to the DEPARTMENT prior to the policy's expiration or cancellation.
  3. **Certificates of Insurance/Notices.** CONTRACTOR shall provide a Certificate or Certificates of Insurance, in a form satisfactory to the DEPARTMENT, before commencing any work under this Contract. Certificates shall reference the Contract Number. Certificates shall be mailed to:

Name/Title: Danielle Rysedorph, Senior Attorney

Organization: NYS Department of Health

Address: Corning Tower, Empire State Plaza, Room 2438

Address: Albany, NY 12237

Unless otherwise agreed, policies shall be written so as to include a provision that the policy will not be canceled, materially changed, or not renewed without at least 30

days prior written notice except for non-payment as required by law to the DEPARTMENT at the address specified above in this paragraph. In addition, if required by the DEPARTMENT, the CONTRACTOR shall deliver to the DEPARTMENT within forty-five (45) days of such request a copy of any or all policies of insurance not previously provided, certified by the insurance carrier as true and complete.

Certificates of Insurance shall:

- a. Be in the form approved by the DEPARTMENT.
- b. Disclose any deductible, self-insured retention, aggregate limit or any exclusion to the policy that materially changes the coverage required by this Contract.
- c. Specify the Additional Insureds and Named Insureds as required herein.
- d. Refer to this Contract by number, the Supplemental Certificate, and any other attachments on the face of the certificate,
- e. When coverage is provided by a non-admitted carrier, be accompanied by a completed ELANY Affidavit, and
- f. Be signed by an authorized representative of the insurance carrier or producer.

Only original documents (Certificates of Insurance, Supplemental Insurance Certificates, and other attachments) will be accepted.

Electronic forms will be accepted as original documents, provided the subject electronic document can be directly traced back to the insurance carrier, agent, or broker via email distribution or similar means.

4. Primary Coverage. The liability and protective liability insurance policies shall provide primary and non-contributory coverage to the DEPARTMENT for any claim arising from the CONTRACTOR'S Work under this CONTRACT, or as a result of the CONTRACTOR'S activities. Insurance policies that remove or restrict blanket contractual liability located in the "insured contract" definition (as stated in Section V, Number 9, Item f in the ISO CGL policy) so as to limit coverage against claims that arise out of the work, or that remove or modify the "insured contract" exception to the employer's liability exclusion, or that do not cover the additional insured for claims involving injury or employees of the named insured or subcontractors, are not acceptable.
5. Policy Renewal/Expiration. At least two weeks prior to the expiration of any policy required by this Contract, evidence of renewal or replacement policies of insurance with terms no less favorable to the DEPARTMENT than the expiring policies shall be delivered to the DEPARTMENT in the manner required for service of notice in subsection B.3. Certificates of Insurances/Notices of this Section. If, at any time during the term of this Contract, the coverage provisions and limits of the policies required herein do not meet the provisions and limits set forth in this Contract or proof thereof is not provided to the DEPARTMENT, the CONTRACTOR shall immediately cease work under this Contract. The CONTRACTOR shall not resume work under this Contract



until authorized to do so by the DEPARTMENT. Any delay, time lost, or additional cost incurred as a result of the CONTRACTOR not having insurance required by this Contract or not providing proof of same in a form acceptable to the DEPARTMENT shall not give rise to a delay claim or any other claim against the DEPARTMENT. Should the CONTRACTOR fail to provide or maintain any insurance required by this Contract, or proof thereof is not provided to the DEPARTMENT, the DEPARTMENT may withhold further Contract payments, treat such failure as a breach or default of the Contract, and/or, after providing written notice to the CONTRACTOR, require the Surety, if any, to secure appropriate coverage and/or purchase insurance complying with this Contract and charge back such purchase to the CONTRACTOR.

6. Self-Insured Retention/Deductibles. Certificates of Insurance must indicate the applicable deductible/self-insured retentions above \$100,000.00, which are subject to approval from the DEPARTMENT. Additional surety/security may be required in certain circumstances. The CONTRACTOR shall be solely responsible for all claim expenses and loss payments within the deductible or self-insured retention.
7. Subcontractors. Should the CONTRACTOR engage a subcontractor, the CONTRACTOR shall endeavor to impose the insurance requirements of this document on the subcontractor, as applicable. Required insurance limits should be determined commensurate with the work of the subcontractor. Proof thereof shall be supplied to the DEPARTMENT.

#### C. Specific Coverages and Limits

The types of insurance and minimum policy limits shall be as follows:

##### 1. Workers' Compensation

For work to be performed in New York State, the CONTRACTOR shall provide and maintain coverage during the life of this Contract for the benefit of such employees as are required to be covered by the NYS Workers' Compensation Law. The CONTRACTOR shall provide notice to the DEPARTMENT immediately if CONTRACTOR'S Workers' Compensation coverage has lapsed or terminated during the PERIOD of this Contract.

If the Contract involves work on or near a shoreline, a U.S. Longshore and Harbor Workers' Compensation Act and/or Jones Act policy as applicable must be provided. Any waiver of this requirement must be approved by the DEPARTMENT and will only be granted in unique or unusual circumstances.

Unless the CONTRACTOR is a political sub-division of New York State, evidence of Workers' Compensation and Employers Liability coverage must be provided on one of the following forms specified by the Commissioner of the Workers' Compensation Board:

- a. C-105.2 (September 2007, or most current version) – Certificate of Workers' Compensation Insurance.
- b. U-26.3 – Certificate of Workers' Compensation Insurance from the State Insurance Fund.

- c. GSI-105/SI-12 – Certificate of Workers' Compensation Self Insurance.
- d. CE-200 – Certificate of Attestation of Exemption (If CONTRACTOR meets the requirements)

All forms are valid for one year from the date the form is signed/stamped, or until policy expiration, whichever is earlier.

## 2. Disability Benefits

For work to be performed in New York State, the CONTRACTOR shall provide and maintain coverage during the life of this Contract for the benefit of such employees as are required to be covered by the NYS Disability Benefits Law. Any waiver of this requirement must be approved by the DEPARTMENT and will only be granted in unique or unusual circumstances. The CONTRACTOR shall provide notice to the DEPARTMENT immediately if CONTRACTOR'S Disability Benefits coverage has lapsed or terminated during the PERIOD of this Contract.

Evidence of Disability Benefits coverage must be provided on one of the following forms specified by the Commissioner of the Workers' Compensation Board:

- a. DB-120.1 (May 2006 or most current version) – Certificate of Insurance Coverage under the NYS Disability Benefits Law
- b. DB-155 – Certificate of Disability Self Insurance
- c. CE-200 – Certificate of Attestation of Exemption

All forms are valid for one year from the date the form is signed/stamped, or until policy expiration, whichever is earlier.

## 3. Commercial General Liability

For work to be performed in New York State, the CONTRACTOR shall provide and maintain Commercial General Liability Insurance (CGL) covering the liability of the CONTRACTOR for bodily injury, property damage, and personal/advertising injury arising from all work and operations under this Contract, using form CG 00 01 12 07 or a policy providing equivalent coverage. The limits under such policy shall not be less than the following:

- a. Each Occurrence limit - \$1,000,000
- b. General Aggregate - \$2,000,000
- c. Products/Completed Operations must be equivalent to the "General Aggregate" limit
- d. Personal/Advertising Injury - \$1,000,000
- e. Damage to Rented Premises - \$50,000
- f. Medical Expense - \$5,000

Coverage shall include, if applicable, the following:

- a. premises liability;
- b. independent contractors/subcontractors;
- c. blanket Contractual liability, including tort liability of another assumed in a Contract;

- d. defense and/or indemnification obligations, including obligations assumed under this Contract;
- e. cross liability for additional insureds;
- f. products/completed operations for a term of no less than 3 years, commencing upon acceptance of the work, as required by this Contract;
- g. explosion, collapse, and underground hazards;
- h. CONTRACTOR means and methods;
- i. liability resulting from Section 240 or Section 241 of the New York State Labor Law; and
- j. Cybersecurity Liability.

The following ISO forms must be endorsed to the policy:

- a. CG 00 01 01 96 or an equivalent – Commercial General Liability Coverage Form
- b. CG 20 10 11 85 or an equivalent – Additional Insured-Owner, Lessees or CONTRACTORS (Form B)
- c. CG 25 03 11 85 or an equivalent – Designated Construction Project(s) general aggregate limit (only required for construction Contracts).

Limits may be provided through a combination of primary and umbrella/excess liability policies. The CGL aggregate shall be endorsed to apply on a per project basis for construction Contracts.

Policies shall name the State of New York as Additional Insured, and such coverage shall be extended to afford Additional Insured status to those entities during the Products/Completed Operations term.

The CGL policy, and any umbrella/excess policies used to meet the "Each Occurrence" limits specified above, must be endorsed to be primary with respects to the coverage afforded the Additional Insureds, and such policy(ies) shall be primary to, and non-contributing with, any other insurance maintained by the DEPARTMENT. Any other insurance maintained by the DEPARTMENT shall be in excess of and shall not contribute with the CONTRACTOR'S or subcontractor's insurance, regardless of the "Other Insurance" clause contained in either party's policy of insurance.

#### 4. Commercial Automobile Liability

Commercial Auto Liability insurance covering liability arising out of the use of any motor vehicle in connection with the work, including owned, leased, hired and non-owned vehicles bearing or, under the circumstances under which they are being used, required by the Motor Vehicle Laws of the State of New York to bear, license plates. Such policy shall have a combined single limit for Bodily Injury and Property Damage of at least one million dollars and shall name the State of New York as additional insured. The limits may be provided through a combination of primary and umbrella/excess liability policies. If this Contract involves the removal of hazardous waste from the project site or otherwise transporting hazardous materials, pollution liability coverage for covered

autos shall be provided by form CA 99 48 03 06 or CA 00 12 03 06 and the Motor Carrier Act Endorsement (MCS90) shall be attached.

#### 5. Umbrella and Excess Liability

When the limits of the CGL, Auto, and/or Employers Liability policies procured are insufficient to meet the limits specified, the CONTRACTOR shall procure and maintain Commercial Umbrella and/or Excess Liability policies with limits in excess of the primary; provided, however, that the total amount of insurance coverage is at least equal to the requirements set forth above. Such policies shall follow the same form as the primary. Any insurance maintained by the DEPARTMENT or any additional insured shall be considered excess of and shall not contribute with any other insurance procured and maintained by the CONTRACTOR including primary, umbrella and excess liability regardless of the "other insurance" clause contained in either party's policy.

### V. Conflicts of Interest

- A. Prior to the execution of this Contract, the CONTRACTOR shall provide to the DEPARTMENT a form (Attachment 4, Contractor Assurance of No Conflict of Interest or Detrimental Effect), signed by an authorized executive or legal representative, attesting that the CONTRACTOR'S performance of the services does not and will not create a conflict of interest with, nor position the CONTRACTOR to breach any other Contract currently in force with the State of New York, and that the CONTRACTOR will not act in any manner that is detrimental to any State of New York project in which the CONTRACTOR is rendering services.
- B. The CONTRACTOR hereby reaffirms the attestations made in Attachment 4 and further covenants and represents that there is and shall be no actual or potential conflict of interest that could prevent the CONTRACTOR'S satisfactory or ethical performance of duties required to be performed pursuant to the terms of this Contract. The CONTRACTOR shall have a duty to notify the DEPARTMENT immediately of any actual or potential conflicts of interest.
- C. In conjunction with any subcontract under this Contract, the CONTRACTOR shall obtain and deliver to the DEPARTMENT, prior to entering into a subcontract, Attachment 4 Contractor Assurance of No Conflict of Interest or Detrimental Effect form, signed by an authorized executive or legal representative of the subcontractor. The CONTRACTOR shall also require in any subcontracting contract that the subcontractor, in conjunction with any further subcontracting contract, obtain and deliver to the DEPARTMENT a signed and completed Contractor Assurance of No Conflict of Interest or Detrimental Effect form for each of its subcontractors
- D. prior to entering into a subcontract.

The CONTRACTOR shall disclose any existing or contemplated relationship with any other person or entity, including relationships with any member, shareholders of 5% or more, parent, subsidiary, or affiliated entity which would constitute an actual or potential conflict of interest or appearance of impropriety, relating to other clients/customers of the CONTRACTOR or former officers and employees of the DEPARTMENT and its affiliates, in connection with rendering services enumerated in this Contract. If a conflict does

or might exist, please describe how you will eliminate or prevent it. Indicate what procedures will be followed to detect, notify the DEPARTMENT of, and resolve any such conflicts. The DEPARTMENT will review the nature of any relationships and reserves the right to terminate this Contract for any reason, or for cause, if, in the judgment of the DEPARTMENT, a real or potential conflict of interest cannot be cured.

- E. The CONTRACTOR shall disclose whether it or any of its members, shareholders of 5% or more, parents, affiliates, or subsidiaries have been the subject of any investigation or disciplinary action by the New York State Joint Commission on Public Ethics, or its predecessors or its predecessor entities (collectively, "Commission"), and if so, shall include a brief description indicating how any matter before the Commission was resolved or whether it remains unresolved. The DEPARTMENT will review the nature of any relationships and reserves the right to terminate this Contract for any reason, or for cause, if, in the judgment of the DEPARTMENT, a real or potential conflict of interest cannot be cured.
- F. The DEPARTMENT and the CONTRACTOR recognize that conflicts may occur in the future because the CONTRACTOR may have existing, or establish new, relationships. The DEPARTMENT will review the nature of any relationships and reserves the right to terminate this Contract for any reason, or for cause, if, in the judgment of the DEPARTMENT, a real or potential conflict of interest cannot be cured.

## **VI. Public Officers Law**

Contractors, consultants, vendors, and subcontractors may hire former employees of the DEPARTMENT. However, for informational purposes, in accordance with New York Public Officers Law, former employees of the State Agency or Authority may neither appear nor practice before the State Agency or Authority, nor receive compensation for services rendered on a matter before the State Agency or Authority, for a period of two years following their separation from State Agency or Authority service. In addition, former State Agency or Authority employees are subject to a "lifetime bar" from appearing before the State Agency or Authority or receiving compensation for services regarding any transaction in which they personally participated or which was under their active consideration during their tenure with the State Agency or Authority.

## **VII. Ethics Requirements**

The CONTRACTOR and its subcontractors shall not engage any person who is, or has been at any time, in the employ of the DEPARTMENT to perform services in violation of the provisions of the New York Public Officers Law, other laws applicable to the service of DEPARTMENT employees, and the rules, regulations, opinions, guidelines or policies promulgated or issued by the New York State Joint Commission on Public Ethics, or its predecessors (collectively, the "Ethics Requirements"). The CONTRACTOR certifies that all of its employees and those of its subcontractors who are former employees of the DEPARTMENT and who are assigned to perform services under this Contract shall be assigned in accordance with all Ethics Requirements. During the Term, no person who is employed by the CONTRACTOR or its subcontractors and who is disqualified from providing services under this Contract pursuant to any Ethics Requirements may share in any net revenues of the CONTRACTOR or its subcontractors derived from this Contract. The

CONTRACTOR shall identify and provide the DEPARTMENT with notice of those employees of the CONTRACTOR and its subcontractors who are former employees of the DEPARTMENT that will be assigned to perform services under this Contract, and ensure that such employees comply with all applicable laws and prohibitions. The DEPARTMENT may request that the CONTRACTOR provide whatever information the DEPARTMENT deems appropriate about each such person's engagement, work cooperatively with the DEPARTMENT to solicit advice from the New York State Joint Commission on Public Ethics, and, if deemed appropriate by the DEPARTMENT, instruct any such person to seek the opinion of the New York State Joint Commission on Public Ethics. The DEPARTMENT shall have the right to withdraw or withhold approval of any subcontractor if utilizing such subcontractor for any work performed hereunder would be in conflict with any of the Ethics Requirements. The DEPARTMENT shall have the right to terminate this Contract at any time if any work performed hereunder is in conflict with any of the Ethics Requirements.

### **VIII. Subcontracting**

- A. The CONTRACTOR agrees not to subcontract any of its services, as indicated in its Scope of Work, without the prior written approval of the DEPARTMENT. Approval shall not be unreasonably withheld upon receipt of written request to subcontract.
- B. The CONTRACTOR may arrange for a portion/s of its responsibilities under this Contract to be subcontracted to qualified, responsible subcontractors, subject to approval of the DEPARTMENT. If the CONTRACTOR determines to subcontract a portion of the services, once known, the subcontractors must be clearly identified and the nature and extent of their involvement in and/or proposed performance under this Contract must be fully explained by the CONTRACTOR to the DEPARTMENT. As part of this explanation, the CONTRACTOR must submit to the DEPARTMENT a completed Contractor Assurance of No Conflict of Interest or Detrimental Effect form (Attachment 4), from each known subcontractor as required under this section.
- C. The CONTRACTOR retains ultimate responsibility for all services performed under the Contract.
- D. All subcontracts shall be in writing and shall contain provisions which are functionally identical to and consistent with the provisions of this Contract, including, but not limited to, the body of this Contract, Appendix A – Standard Clauses for New York State Contracts and, if applicable, Appendix B. Unless waived in writing by the DEPARTMENT, all subcontracts between the CONTRACTOR and subcontractors shall expressly name the DEPARTMENT as the sole intended third party beneficiary of such subcontract. The DEPARTMENT reserves the right to review and approve or reject any subcontract, as well as any amendment to said subcontract(s), and this right shall not make the DEPARTMENT a party to any subcontract or create any right, claim, or interest in the subcontractor or proposed subcontractor against the DEPARTMENT.
- E. The DEPARTMENT reserves the right, at any time during the term of the Contract, to verify that the written subcontract between the CONTRACTOR and subcontractors is in compliance with all of the provisions of this Section and any other subcontract provisions contained in this Contract.

- F. The CONTRACTOR shall give the DEPARTMENT immediate notice in writing of the initiation of any legal action or suit which relates in any way to a subcontract with a subcontractor or which may affect the performance of the CONTRACTOR'S duties under the Contract. Any subcontract shall not relieve the CONTRACTOR in any way of any responsibility, duty and/or obligation of this Contract.
- G. If at any time during performance under this Contract total compensation to a subcontractor exceeds or is expected to exceed \$100,000, that subcontractor shall be required to submit and certify a Vendor Responsibility Questionnaire.

## **IX. General Specifications**

- A. The work shall be commenced and shall be actually undertaken within such time as the DEPARTMENT may direct by notice, whether by mail, e-mail, or other writing, whereupon the undersigned will give continuous attention to the work as directed, to the end and with the intent that the work shall be completed within such reasonable time or times, as the case may be, as the DEPARTMENT may prescribe.
- B. The CONTRACTOR will be required to complete the entire work or any part thereof as the case may be, to the satisfaction of the DEPARTMENT in strict accordance with the specifications and pursuant to this Contract.
- C. CONTRACTOR will possess, and maintain, at no cost to the DEPARTMENT and for the term of the Contract, all qualifications, licenses and permits to engage in the required business as may be required within the jurisdiction where the work specified is to be performed. Workers to be employed in the performance of this Contract will possess the qualifications, training, licenses and permits as may be required within such jurisdiction.
- D. Certification Regarding Debarment and Suspension

Regulations of the Department of Health and Human Services, located at Part 376 of Title 2 of the Code of Federal Regulations (CFR), implement Executive Orders 12549 and 12689 concerning debarment and suspension of participants in federal programs and activities. Executive Order 12549 provides that, to the extent permitted by law, Executive Departments and agencies shall participate in a government-wide system for non-procurement debarment and suspension. Executive Order 12689 extends the debarment and suspension policy to procurement activities of the federal government. A person who is debarred or suspended by a federal agency is excluded from federal financial and non-financial assistance and benefits under federal programs and activities, both directly (primary covered transaction) and indirectly (lower tier covered transactions). Debarment or suspension by one federal agency has government-wide effect.

Pursuant to the above-cited regulations, the DEPARTMENT (as a participant in a primary covered transaction) may not knowingly do business with a person who is debarred, suspended, proposed for debarment, or subject to other government-wide exclusion (including any exclusion from Medicare and State health care program participation on or after August 25, 1995), and the DEPARTMENT must require its prospective CONTRACTORS, as prospective lower tier participants, to provide the certification as set forth below:

By signing this Contract or submitting a proposal pursuant to a solicitation issued by the Department, the prospective lower tier participant is providing the certification set out below:

- a. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to the other remedies available, the Federal Government, New York State or the DEPARTMENT may pursue available remedies, including suspension and/or debarment.
- b. The prospective lower tier participant shall provide immediate written notice to the person to whom this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.
- c. The terms covered transaction, debarred, suspended, ineligible, lower tier covered transaction, participant, person, primary covered Transaction, principal, proposal, and voluntarily excluded, as used in this Section, are defined in 2 CFR Part 180, as supplemented by 2 CFR Part 376.
- d. The prospective lower tier participant agrees by signing this Contract or submitting a proposal pursuant to a solicitation issued by the DEPARTMENT that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is proposed for debarment under 2 CFR Part 180, as supplemented by 2 CFR Part 376, or 48 CFR Part 9, Subpart 9.4, debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the DEPARTMENT.
- e. The prospective lower tier participant further agrees by signing this Contract or proposal that it will include this clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transaction," without modification, in all lower tier covered transactions.
- f. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not proposed for debarment under 2 CFR Part 180, as supplemented by 2 CFR Part 376, or 48 CFR Part 9, Subpart 9.4, debarred, suspended, ineligible, or voluntarily excluded from covered transactions, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. The DEPARTMENT strongly encourages each participant to check the List of parties Excluded from Federal Procurement and Non-procurement Programs in the System for Award Management.



- g. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this Section.
- h. Except for transactions authorized under paragraph (d) of this certification, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is proposed for debarment under 2 CFR Part 180 or 48 CFR Part 9, Subpart 9.4, suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available, the Federal Government, the New York State or the DEPARTMENT may pursue available remedies, including suspension and/or debarment.
- i. Certification regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion – Lower Tier Covered Transactions
  - i. The prospective lower tier participant certifies, by signing this Contract or submitting a proposal to the Department, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily exclude from participation in this transaction by any federal agency.
  - ii. Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

#### E. Ownership Clauses

1. Any materials, articles, papers, etc., developed by the CONTRACTOR under or in the course of performing this Contract shall contain the following, or similar acknowledgment: "Funded by the New York State Department of Health." Any such materials must be reviewed and approved by the DEPARTMENT for conformity with the policies and guidelines of the DEPARTMENT prior to dissemination and/or publication. It is agreed that such review will be conducted in an expeditious manner. Should the review result in any unresolved disagreements regarding content, the CONTRACTOR shall be free to publish in scholarly journals along with a disclaimer that the views within the Article or the policies reflected are not necessarily those of the New York State Department of Health. The DEPARTMENT reserves the right to disallow funding for any educational materials not approved through its review process.
2. Any publishable or otherwise reproducible material developed under or in the course of performing this Contract, dealing with any aspect of performance under this Contract, or of the results and accomplishments attained in such performance, shall be the sole and exclusive property of the DEPARTMENT, and shall not be published or otherwise disseminated by the CONTRACTOR to any other party unless prior written approval is secured from the DEPARTMENT or under circumstances as indicated in paragraph 1 of this subsection. Any and all net proceeds obtained by the CONTRACTOR resulting from any such publication shall belong to and be paid over to the DEPARTMENT. The DEPARTMENT shall have a perpetual royalty-free, non-

exclusive and irrevocable right to reproduce, publish or otherwise use, and to authorize others to use, any such material for governmental purposes.

3. No report, document or other data produced in whole or in part with the funds provided under this Contract may be copyrighted by the CONTRACTOR or any of its employees, nor shall any notice of copyright be registered by the CONTRACTOR or any of its employees in connection with any report, document or other data developed pursuant to this Contract, without express written permission of the DEPARTMENT.
4. All reports, data sheets, documents, etc. generated under this Contract shall be the sole and exclusive property of the DEPARTMENT. The CONTRACTOR shall have no right to disclose or use any of such material and documentation for any purpose whatsoever, without the prior written approval of the DEPARTMENT or its authorized agents.
5. This is a "Work for Hire" Contract. The DEPARTMENT will be the sole owner of all source code and any software which is developed for use in any application software provided to the DEPARTMENT as a part of this Contract.

#### F. Confidentiality Clause

The CONTRACTOR, its officers, agents and employees and subcontractors shall treat all information which is obtained by it through its performance under this CONTRACT, as confidential information to the extent required by the laws and regulations of the United States and laws and regulations of the State of New York.

#### G. Date/Time Warranty

1. Definitions: For the purposes of this warranty, the following definitions apply:

"Product" shall include, without limitation: when solicited from a vendor in a state government entity's Contracts, RFPs, IFBs, or mini-bids, any piece or component of equipment, hardware, firmware, middleware, custom or commercial software, or internal components or subroutines therein which perform any date/time data recognition, function, calculation, comparing or sequencing. Where services are being furnished, e.g., consulting, systems integration, code or data conversion or data entry, the term "Product" shall include resulting deliverables.

"Third Party Product" shall include product manufactured or developed by a corporate entity independent from the vendor and provided by the vendor on a non-exclusive licensing or other distribution Contract with the third party manufacturer. "Third Party Product" does not include product where vendor is: (a) a corporate subsidiary or affiliate of the third party manufacturer/developer; and/or (b) the exclusive re-seller or distributor of product manufactured or developed by said corporate entity.

2. Date/Time Warranty Statement

CONTRACTOR warrants that Product(s) furnished pursuant to this Contract shall, when used in accordance with the Product documentation, be able to accurately process date/time data (including, but not limited to, calculating, comparing, and sequencing) transitions, including leap year calculations.

Where a CONTRACTOR proposes or an acquisition requires that specific Products must perform as a package or system, this warranty shall apply to the Products as a system.

Where CONTRACTOR is providing ongoing services, including but not limited to: (a) consulting, integration, code or data conversion, b) maintenance or support services, c) data entry or processing, or d) contract administration services (e.g., billing, invoicing, claim processing), CONTRACTOR warrants that services shall be provided in an accurate and timely manner without interruption, failure or error due to the inaccuracy of CONTRACTOR'S business operations in processing date/time data (including, but not limited to, calculating, comparing, and sequencing) various date/time transitions, including leap year calculations. CONTRACTOR shall be responsible for damages resulting from any delays, errors or untimely performance resulting therefrom, including but not limited to the failure or untimely performance of such services.

This Date/Time Warranty shall survive beyond termination or expiration of this Contract through: (a) ninety (90) days or (b) the CONTRACTOR'S or Product manufacturer or developer's stated date/time warranty term, whichever is longer. Nothing in this warranty statement shall be construed to limit any rights or remedies otherwise available under this Contract for breach of warranty.

#### H. Lead Guidelines

All products supplied pursuant to this Contract shall meet local, state and federal regulations, guidelines and action levels for lead as they exist at the time of the DEPARTMENT'S acceptance of this Contract.

#### I. On-Going Responsibility

1. General Responsibility Language: The CONTRACTOR shall at all times during this Contract term remain responsible. The CONTRACTOR agrees, if requested by the Commissioner of Health or his or her designee, to present evidence of its continuing legal authority to do business in New York State, integrity, experience, ability, prior performance, and organizational and financial capacity.
2. Suspension of Work (for Non-Responsibility): The Commissioner of Health or his or her designee, in his or her sole discretion, reserves the right to suspend any or all activities under this Contract, at any time, when he or she discovers information that calls into question the responsibility of the CONTRACTOR. In the event of such suspension, the CONTRACTOR will be given written notice outlining the particulars of such suspension. Upon issuance of such notice, the CONTRACTOR must comply with the terms of the suspension order. Contract activity may resume at such time as the Commissioner of Health or his or her designee issues a written notice authorizing a resumption of performance under this Contract.
3. Termination (for Non-Responsibility): Upon written notice to the CONTRACTOR, and a reasonable opportunity to be heard with appropriate DEPARTMENT officials or staff, this Contract may be terminated by Commissioner of Health or his or her designee at the CONTRACTOR'S expense where the CONTRACTOR is determined by the Commissioner of Health or his or her designee to be non-responsible. In such event,

the Commissioner of Health or his or her designee may complete the contractual requirements in any manner he or she may deem advisable and pursue available legal or equitable remedies for breach.

J. Indemnification

CONTRACTOR shall be fully liable for the actions of its agents, employees, partners or subcontractors and shall fully indemnify and save harmless the DEPARTMENT from suits, actions, damages and costs of every name and description relating to personal injury and damage to real or personal tangible property and intellectual property, caused by any intentional act or negligence of CONTRACTOR, its agents, employees, partners or subcontractors, without limitation; provided, however, that the CONTRACTOR shall not indemnify for that portion of any claim, loss or damage arising hereunder due to the negligent act or failure to act of the DEPARTMENT.

K. Indemnification Relating to the Third Party Rights

1. The CONTRACTOR will also indemnify and hold the DEPARTMENT harmless from and against any and all damages, expenses (including reasonable attorneys' fees), claims, judgments, liabilities and costs that may be finally assessed against the DEPARTMENT in any action for infringement of a United States Letter Patent, or of any copyright, trademark, trade secret or other third party proprietary right except to the extent such claims arise from the DEPARTMENT'S gross negligence or willful misconduct, provided that the DEPARTMENT shall give CONTRACTOR: (a) prompt written notice of any action, claim or threat of infringement suit, or other suit, (b) the opportunity to take over, settle or defend such action, claim or suit at CONTRACTOR'S sole expense, and (c) assistance in the defense of any such action at the expense of CONTRACTOR.
2. If usage shall be enjoined for any reason or if CONTRACTOR believes that it may be enjoined, CONTRACTOR shall have the right, at its own expense and sole discretion to take action in the following order of precedence: (a) to procure for the DEPARTMENT the right to continue Usage; (b) to modify the service or Product so that Usage becomes non-infringing, and is of at least equal quality and performance; or (c) to replace said service or Product or part(s) thereof, as applicable, with non-infringing service or Product of at least equal quality and performance. If the above remedies are not available, the parties shall terminate this Contract, in whole or in part as necessary and applicable, provided the DEPARTMENT is given a refund for any amounts paid for the period during which Usage was not feasible.

L. Force Majeure

1. A force majeure occurrence is an event or effect that cannot be reasonably anticipated or controlled by the DEPARTMENT or the CONTRACTOR, its subcontractors, or others under the CONTRACTOR'S or its subcontractor's control. Force majeure includes, but is not limited to, acts of God, acts of war, acts of public enemies, strikes, fires, explosions, actions of the elements, floods, or other similar causes beyond the control of the CONTRACTOR or the DEPARTMENT in the performance of this Contract where non-performance, by exercise of reasonable diligence, cannot be

- prevented. The CONTRACTOR shall provide the DEPARTMENT with written notice of any force majeure occurrence as soon as the force majeure occurrence giving rise to a delay in CONTRACTOR'S performance under this Contract is known.
2. Neither the CONTRACTOR nor the DEPARTMENT shall be liable to the other for any delay in or failure of performance under this Contract due to a force majeure occurrence. Any such delay in or failure of performance shall not constitute default or give rise to any liability for damages. The existence of such causes of such delay or failure shall extend the period for performance to such extent as determined by the CONTRACTOR and the DEPARTMENT to be necessary to enable complete performance by the CONTRACTOR if reasonable diligence is exercised after the case of delay or failure has been removed.
  3. Notwithstanding the above, at the discretion of the DEPARTMENT where the delay or failure will significantly impair the value of this Contract to the DEPARTMENT, the DEPARTMENT may:
    - a. Accept allocated performance or deliveries from the CONTRACTOR. The CONTRACTOR, however, hereby agrees to grant preferential treatment to the DEPARTMENT with respect to product, materials, or services; or
    - b. Purchase from other sources (without recourse to and by the CONTRACTOR for the costs and expenses thereof) to replace all or part of the product, materials, or services which are the subject of the delay, which purchases may be deducted from the Contract quantities without penalty or liability to the DEPARTMENT; or
    - c. Terminate the Contract, or the portion thereof which is subject to delays, and thereby discharge any unexecuted portion of this Contract or the relevant part thereof.
  4. In addition, the DEPARTMENT reserves the right, at its sole discretion, to make an equitable adjustment in the Contract terms and/or pricing should extreme and unforeseen volatility in the marketplace affect pricing or the availability of supply. "Extreme and unforeseen volatility in the marketplace" is defined as market circumstances which meet the following criteria: (a) the volatility is due to causes outside the control of the CONTRACTOR; (b) the volatility affects the marketplace or industry, not just the particular source of supply utilized for performance of this Contract; (c) the effect on pricing or availability of supply is substantial; and (d) the volatility so affects the CONTRACTOR'S performance that continued performance of this Contract would result in a substantial loss.

#### M. Notices

All notices permitted or required hereunder shall be in writing and shall be transmitted either:

- a. via certified or registered United States mail, return receipt requested;
- b. by facsimile transmission;
- c. by personal delivery;
- d. by expedited delivery service; or
- e. by e-mail

Such notices shall be addressed as follows or to such different addresses as the parties may from time to time designate:

**Contact at State of New York Department of Health**

Name/Title    Danielle Rysedorph, Senior Attorney  
Address        Corning Tower, Empire State Plaza, Rm. 2438  
Email          Danielle.Rysedorph@health.ny.gov  
Phone/Fax     518-473-4631

**Contact at Contractor**

Name/Title    Stephen Juris, Partner  
Address        One New York Plaza, New York, NY 10004  
Email          Stephen.Juris@friedfrank.com  
Phone/Fax     212-859-8935

Any such notices shall be deemed to have been given either at the time of personal delivery or, in the case of expedited delivery service or certified or registered United States mail, as of the date of first attempted delivery at the address and in the manner provided herein, or in the case of facsimile transmission or email, upon receipt.

The parties may, from time to time, specify any new or different address in the United States as their address for purpose of receiving notice under this Contract by giving fifteen (15) days written notice to the other party sent in accordance herewith. The parties agree to mutually designate individuals as their respective representative for the purposes of receiving notices under this Contract. Additional individuals may be designated in writing by the parties for purposes of implementation and administration/billing, resolving issues and problems, and/or for dispute resolution.

**N. Provision Related to Consultant Disclosure Legislation**

If this Contract is for the provision of consulting services as defined in Subdivision 17 of Section 8 of the State Finance Law, the CONTRACTOR shall submit a "State Consultant Services Form B, CONTRACTOR'S Annual Employment Report" no later than May 15th following the end of each DEPARTMENT fiscal year included in this Contract term. This report must be submitted to:

1. The NYS Department of Health, at the following address New York State Department of Health, Bureau of Contracts Room 2827, Corning Tower, Albany, NY 12237; and
2. The NYS Office of the State Comptroller, Bureau of Contracts, 110 State Street, 11<sup>th</sup> Floor, Albany NY 12236 ATTN: Consultant Reporting or via fax at (518) 474-8030 or (518) 473-8808; and
3. The NYS Department of Civil Service, Albany NY 12239, ATTN: Consultant Reporting.

O. Provisions Related to New York State Information Security Breach and Notification Act

CONTRACTOR shall comply with the provisions of the New York State Information Security Breach and Notification Act (General Business Law Section 899-aa; State Technology Law Section 208). CONTRACTOR shall be liable for the costs associated with such breach if caused by CONTRACTOR'S negligent or willful acts or omissions, or the negligent or willful acts or omissions of CONTRACTOR'S agents, officers, employees or subcontractors.

P. Technology Purchases Notification

The following provisions apply if this Request for Proposal (RFP) seeks proposals for "Technology."

1. For the purposes of this policy, "Technology" applies to all services and commodities, voice/data/video and/or any related requirement, major software acquisitions, systems modifications or upgrades, etc., that result in a technical method of achieving a practical purpose or in improvements of productivity. The purchase can be as simple as an order for new or replacement personal computers, or for a consultant to design a new system, or as complex as a major systems improvement or innovation that changes how an agency conducts its business practices.
2. If this RFP results in procurement of software over \$20,000, or of other technology over \$50,000, or where the DEPARTMENT determines that the potential exists for coordinating purchases among New York State agencies and/or the purchase may be of interest to one or more other New York State agencies, prior to award selection, this RFP and all responses thereto are subject to review by the New York State Office for Information Technology Services.
3. Accessibility of State Agency Web-based Intranet and Internet Information and Applications. Any web-based intranet and Internet information and applications development, or programming delivered pursuant to the Contract or procurement, will comply with New York State Enterprise IT Policy NYS-P08-005, Accessibility of Web-Based Information and Applications as such policy may be amended, modified or superseded, which requires that state agency web-based intranet and Internet information and applications are accessible to persons with disabilities. Web content must conform to New York State Enterprise IT Policy NYS-P08-005, as determined by quality assurance testing. Such quality assurance testing will be conducted by the DEPARTMENT and awarded CONTRACTOR and the results of such testing must be satisfactory to the DEPARTMENT before web content will be considered a qualified deliverable under the Contract or procurement.

## **APPENDIX M**

### **PARTICIPATION BY MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISES**

#### **I. General Provisions**

- A. The New York State Department of Health is required to implement the provisions of New York State Executive Law Article 15-A (Article 15-A) and 5 NYCRR Parts 140-145 ("MWBE Regulations") for all state Contracts as defined therein, with a value (1) in excess of \$25,000 for labor, services, equipment, materials, or any combination of the foregoing or (2) in excess of \$100,000 for real property renovations and construction.
- B. The CONTRACTOR to this Contract agrees, in addition to any other nondiscrimination provision of this Contract and at no additional cost to the DEPARTMENT to fully comply and cooperate with the DEPARTMENT in the implementation of New York State Executive Law Article 15-A. These requirements include equal employment opportunities for minority group members and women ("EEO") and contracting opportunities for certified minority and women-owned business enterprises ("MWBEs"). CONTRACTOR's demonstration of "good faith efforts" pursuant to 5 NYCRR §142.8 shall be a part of these requirements. These provisions shall be deemed supplementary to, and not in lieu of, the nondiscrimination provisions required by New York State Executive Law Article 15 (the "Human Rights Law") or other applicable federal, state or local laws.
- C. Failure to comply with all of the requirements herein may result in a finding of non-responsiveness, non-responsibility and/or a breach of this Contract, leading to the withholding of funds or such other actions, liquidated damages pursuant to Section VII of this Appendix or enforcement proceedings as allowed by this Contract.

#### **II. Contract Goals**

- A. For purposes of this procurement, the DEPARTMENT hereby establishes an overall goal of 0 % for MWBEs participation, 0 % for Minority-Owned Business Enterprises ("MBE") participation and 0 % for Women-Owned Business Enterprises ("WBE") participation (based on the current availability of qualified MBEs and WBEs).
- B. For purposes of providing meaningful participation by MWBEs on this Contract and achieving the Contract Goals established in Section II-A hereof, CONTRACTOR should reference the directory of New York State Certified MBWEs found at the following internet address: <http://www.esd.ny.gov/mwbe.html>.
- C. Additionally, CONTRACTOR is encouraged to contact the Division of Minority and Women's Business Development ((518) 292-5250; (212) 803-2414; or (716) 846-8200) to discuss additional methods of maximizing participation by MWBEs on the Contract.

Where MWBE goals have been established herein, pursuant to 5 NYCRR §142.8, CONTRACTOR must document "good faith efforts" to provide meaningful participation by MWBEs as subcontractors or suppliers in the performance of this Contract. In



accordance with Section 316-a of Article 15-A and 5 NYCRR §142.13, the CONTRACTOR acknowledges that if CONTRACTOR is found to have willfully and intentionally failed to comply with the MWBE participation goals set forth in this Contract, such a finding constitutes a breach of this Contract and the CONTRACTOR shall be liable to the DEPARTMENT for liquidated or other appropriate damages, as set forth herein.

### **III. Equal Employment Opportunity (EEO)**

- A.** CONTRACTOR agrees to be bound by the provisions of Article 15-A and the MWBE Regulations promulgated by the Division of Minority and Women's Business Development of the Department of Economic Development. If any of these terms or provisions conflict with applicable law or regulations, such laws and regulations shall supersede these requirements.
- B.** CONTRACTOR shall comply with the following provisions of Article 15-A:
  - 1. CONTRACTOR and subcontractors shall undertake or continue existing EEO programs to ensure that minority group members and women are afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status. For these purposes, EEO shall apply in the areas of recruitment, employment, job assignment, promotion, upgrading, demotion, transfer, layoff, or termination and rates of pay or other forms of compensation.
  - 2. The CONTRACTOR shall submit an EEO policy statement to the DEPARTMENT within seventy-two (72) hours after the date of the notice by the DEPARTMENT to award this Contract to the CONTRACTOR.
  - 3. If CONTRACTOR or subcontractor does not have an existing EEO policy statement, the DEPARTMENT may provide the CONTRACTOR or subcontractor a model statement (see Form #5 - Minority and Women-Owned Business Enterprises Equal Employment Opportunity Policy Statement).
  - 4. The CONTRACTOR'S EEO policy statement shall include the following language:
    - a. The CONTRACTOR will not discriminate against any employee or applicant for employment because of race, creed, color, national origin, sex, age, disability or marital status, will undertake or continue existing EEO programs to ensure that minority group members and women are afforded equal employment opportunities without discrimination, and shall make and document its conscientious and active efforts to employ and utilize minority group members and women in its work force.
    - b. The CONTRACTOR shall state in all solicitations or advertisements for employees that, in the performance of this Contract, all qualified applicants will be afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status.
    - c. The CONTRACTOR shall request each employment agency, labor union, or authorized representative of workers with which it has a collective bargaining or other agreement or understanding, to furnish a written statement that

such employment agency, labor union, or representative will not discriminate on the basis of race, creed, color, national origin, sex age, disability or marital status and that such union or representative will affirmatively cooperate in the implementation of the CONTRACTOR'S obligations herein.

**C. Form #4 - Staffing Plan**

To ensure compliance with this Section, the CONTRACTOR shall submit a staffing plan to document the composition of the proposed workforce to be utilized in the performance of this Contract by the specified categories listed, including ethnic background, gender, and Federal occupational categories. CONTRACTOR shall complete the Staffing plan form and submit it as part of their bid or proposal or within a reasonable time, but no later than the time of award of this Contract.

**D. Workforce Utilization Report**

1. The CONTRACTOR shall submit a Workforce Utilization Report, and shall require each of its subcontractors to submit a Workforce Utilization Report, in such form as shall be required by the DEPARTMENT on a QUARTERLY basis during the term of the Contract.
2. Separate forms shall be completed by the CONTRACTOR and any subcontractors.
3. Pursuant to Executive Order #162, CONTRACTORS and subcontractors are also required to report the gross wages paid to each of their employees for the work performed by such employees on the contract on a quarterly basis.

- E.** CONTRACTOR shall comply with the provisions of the Human Rights Law, all other state and federal statutory and constitutional non-discrimination provisions. CONTRACTOR and subcontractors shall not discriminate against any employee or applicant for employment because of race, creed (religion), color, sex, national origin, sexual orientation, military status, age, disability, predisposing genetic characteristic, marital status or domestic violence victim status, and shall also follow the requirements of the Human Rights Law with regard to non-discrimination on the basis of prior criminal conviction and prior arrest.

The CONTRACTOR shall include the provisions of subparagraphs (a) through (c) of paragraph 4 of subsection B and subsection D of this Section which provides for relevant provisions of the Human Rights Law, in every subcontract in such a manner that the requirements of the subdivisions will be binding upon each subcontractor as to work in connection with this Contract.

#### **IV. MWBE Utilization Plan**

- A. The CONTRACTOR represents and warrants that CONTRACTOR has submitted an MWBE Utilization Plan (Form #1) either prior to, or at the time of, the execution of this Contract.
- B. CONTRACTOR agrees to use such MWBE Utilization Plan for the performance of MWBEs on this Contract pursuant to the prescribed MWBE goals set forth in Section II.A of this Appendix.
- C. CONTRACTOR further agrees that a failure to submit and/or use such MWBE Utilization Plan shall constitute a material breach of the terms of this Contract. Upon the occurrence of such a material breach, the DEPARTMENT shall be entitled to any remedy provided herein, including but not limited to, a finding of CONTRACTOR non-responsiveness.

#### **V. Waivers**

- A. For Waiver Requests CONTRACTOR should use Form #2 – Waiver Request.
- B. If the CONTRACTOR, after making good faith efforts, is unable to comply with MWBE goals, the CONTRACTOR may submit a Request for Waiver form documenting good faith efforts by the CONTRACTOR to meet such goals. If the documentation included with the waiver request is complete, the DEPARTMENT shall evaluate the request and issue a written notice of acceptance or denial within twenty (20) days of receipt.
- C. If the DEPARTMENT, upon review of the MWBE Utilization Plan and updated Quarterly MWBE CONTRACTOR Compliance Reports determines that CONTRACTOR is failing or refusing to comply with the Contract goals and no waiver has been issued in regards to such non-compliance, the DEPARTMENT may issue a notice of deficiency to the CONTRACTOR. The CONTRACTOR must respond to the notice of deficiency within seven (7) business days of receipt. Such response may include a request for partial or total waiver of MWBE Contract Goals.

#### **VI. Quarterly MWBE CONTRACTOR Compliance Report**

CONTRACTOR is required to submit a Quarterly MWBE CONTRACTOR Compliance Report to the DEPARTMENT by the 10<sup>th</sup> day following each end of quarter over the term of this Contract documenting the progress made towards achievement of the MWBE goals of this Contract. Data should be submitted via the online compliance system at <https://ny.newnyContracts.com>. Additionally, Contractor and each of its Subcontractors shall be required to submit a Workforce Utilization Report, in such format as shall be required by the DEPARTMENT on a Quarterly basis during the term of the Contract.

## **VII. Liquidated Damages - MWBE Participation**

- A. Where the DEPARTMENT determines that CONTRACTOR is not in compliance with the requirements of this Contract and CONTRACTOR refuses to comply with such requirements, or if CONTRACTOR is found to have willfully and intentionally failed to comply with the MWBE participation goals, CONTRACTOR shall be obligated to pay to the DEPARTMENT liquidated damages.
- B. Such liquidated damages shall be calculated as an amount equaling the difference between:
  - 1. All sums identified for payment to MWBEs had the CONTRACTOR achieved the Contractual MWBE goals; and
  - 2. All sums actually paid to MWBEs for work performed or materials supplied under this Contract.
- C. In the event a determination has been made which requires the payment of liquidated damages and such identified sums have not been withheld by the DEPARTMENT, CONTRACTOR shall pay such liquidated damages to the DEPARTMENT within sixty (60) days after they are assessed by the DEPARTMENT unless prior to the expiration of such sixtieth day, the CONTRACTOR has filed a complaint with the Director of the Division of Minority and Women's Business Development pursuant to Subdivision 8 of Section 313 of the Executive Law in which event the liquidated damages shall be payable if Director renders a decision in favor of the DEPARTMENT.

## **C036361 Appendix C**

### **I. SERVICES TO BE PROVIDED**

The Department of Health ("DEPARTMENT" or "DOH") hereby engages the services of Fried, Frank, Harris, Shriver & Jacobson, LLP ("FRIED FRANK"). DOH requires assistance and representation in responding to multiple inquiries related to investigations of the State's COVID-19 response by law enforcement and other governmental or regulatory bodies. This includes, but is not limited to, inquiries from the U.S. Attorney's Office for the Eastern District of New York, the New York County District Attorney's office, and the New York State Office of the Attorney General, among others. The Department's need for counsel includes legal guidance, advice, and representation regarding responding to governmental inquiries on this matter. This includes consulting with the Department as to legal strategy, substance, and procedure; drafting and reviewing documents; legal research; fact research; witness interviews and preparation; assistance cooperating with law enforcement and other government requests and reviews; and in-depth document collection, review, and production, including e-Discovery-related tasks ("Legal Matters").

### **II. TERMS OF ENGAGEMENT**

DOH hereby engages FRIED FRANK to furnish legal services set forth in paragraph I of this Appendix for the period of February 1, 2021 to January 31, 2022.

### **III. COMPENSATION**

For the services described in paragraph I, the DEPARTMENT will pay FRIED FRANK in an amount equal to charges incurred based upon the actual hours devoted to a particular matter multiplied by the following hourly rates:

<b>Timekeeper Category</b>	<b>Discounted Rates 1/1/2021 to 12/31/2021</b>
Partner A	\$1,000.00
Partner B	\$1,000.00
Premium Special Counsel	\$922.50
Special Counsel 1	\$911.25
Special Counsel 2	\$877.50
Associate: 9 <sup>th</sup> Yr	\$828.75
Associate: 8 <sup>th</sup> Yr	\$813.75
Associate: 7 <sup>th</sup> Yr	\$791.25
Associate: 6 <sup>th</sup> Yr	\$753.75
Associate: 5 <sup>th</sup> Yr	\$727.50
Associate: 4 <sup>th</sup> Yr	\$690.00
Associate: 3 <sup>rd</sup> Yr	\$645.00
Associate: 2 <sup>nd</sup> Yr	\$558.75
Associate: 1 <sup>st</sup> Yr	\$480.00
Discovery Lawyer 1	\$307.50
Discovery Lawyer 2	\$258.75

Legal Assistant 1	\$352.50
Legal Assistant 2	\$311.25
Legal Assistant 3	\$288.75
Legal Assistant 4	\$240.00
Litigation Support 1	\$352.50
Litigation Support 2	\$322.50
Staff Attorney 1	\$408.75
Staff Attorney 2	\$270.00

These rates reflect a 25 percent discount in FRIED FRANK'S current legal rates, with the hourly rates for the two principal Partners working on this matter discounted further to \$1,000. The rates do not take into account Fried Frank's standard change in rates each calendar year. The rates for 2022 and 2023 are not yet set. However, a 25 percent discount will continue to be applied for those years, if it is necessary. FRIED FRANK has also agreed that that if the need arises for an initial contract renewal for an additional year, it is understood that the Partners will need to continue to charge the existing \$1,000 partner rate/hour for the initial 1-year contract renewal in order to obtain renewal approval.

FRIED FRANK will be paid certain costs, other than attorney, paralegal, and staff time, incurred during representation. These reflect costs such as facsimile transmission, photocopying, overnight delivery, and messenger service. All charges are designed to recover the firm's actual cost of providing the services. For in-house services (e.g., photocopying, computer research), the DEPARTMENT is charged the direct cost of the service.

FRIED FRANK will be reimbursed for all reasonable travel, long distance telephone calls, printing, and other special expenses (transcript, subpoena fees, etc.) directly incurred in connection with furnishing services in this matter. Payment of such expenses, where applicable, shall be made pursuant to directives promulgated by the New York State Office of the State Comptroller applicable to Management/Confidential employees.

FRIED FRANK shall not be reimbursed for secretarial services and electronic research charges.

FRIED FRANK, subject to prior approval by the DEPARTMENT, may also engage outside vendors to assist in performing services, including the collection and processing of electronically stored information. The DEPARTMENT shall be responsible for payment of invoices issued by FRIED FRANK which reflect these disbursements.

FRIED FRANK may charge for their professional time, ancillary services and expenses, as well as fees and expenses of counsel incurred in preparing a response to a request for production of their files, with respect to their engagement with the DEPARTMENT, as authorized by the DEPARTMENT or as required by law.

#### **IV. STAFF**

FRIED FRANK shall assign Stephen Juris and Joshua Roth as the lead engagement partners, with assistance from senior and junior associates and in consultation with other partners.

#### **V. GENERAL TERMS**

- A. FRIED FRANK hereby covenants and represents that there is and shall be no actual or potential conflict of interest that has not been otherwise waived by DOH that could prevent the firm's satisfactory or ethical performance of duties required to be performed pursuant to the terms of this AGREEMENT and any other contract or employment; and FRIED FRANK shall have a duty to notify DOH promptly, and in no event more than three business days after discovery, of any such actual or potential conflicts of interest in all that it does to serve the purpose of this AGREEMENT and its intent. If AGENCY determines that such representation conflicts or potentially conflicts with the Firm's continuing representation of AGENCY under this AGREEMENT, such a determination by AGENCY shall constitute a ground on which the AGENCY may terminate this AGREEMENT for cause, if AGENCY elects to do so.
- B. FRIED FRANK shall take all appropriate action to protect the confidentiality of all information supplied to it or developed by it during the course of its performance under the terms of this AGREEMENT.
- C. FRIED FRANK shall keep, maintain and/or make available all books, records and materials related to the performance and operation of this AGREEMENT for the audit and examination by authorized personnel of the Office of the State Comptroller of the State of New York at all reasonable times and places during the period of the execution of the AGREEMENT and for six (6) years from the date of the final payment hereunder.
- D. Opinions prepared by retained attorneys or law firms construing the statutes or Constitution of the State of New York do not constitute the opinion of the State unless the prior written approval of the Attorney General is obtained. Requests for said approval shall be submitted to the Solicitor General, Appeals and Opinions Bureau, Department of Law, State Capitol, Albany, New York.
- E. The retained attorney or law firm will represent the State of New York in judicial litigation related to the services to be provided under this agreement only when such services are specifically requested by the State agency's counsel and approved by the Attorney General. Such approval must be requested separately for each matter to be litigated and must be received prior to the commencement of services therefor.

# APPENDIX F

## TECHNOLOGY TERMS AND CONDITIONS

### DEFINITIONS

**“Analytic Derivatives”** shall mean the outcome from Data Mining or other aggregated Data analysis techniques.

**“Data”** shall mean any information, Analytic Derivatives, formula, algorithms, or other content that the DEPARTMENT may provide to the CONTRACTOR pursuant to this Contract. Data includes, but is not limited to, any of the foregoing that the DEPARTMENT and/or Contractor (i) uploads to the Cloud Service, and/or (ii) creates and/or modifies using the Cloud Solution.

**“Cloud Solution”** shall mean any Product or Service sold as an “as a service” offering and has one or more of the following characteristics:

- a. DEPARTMENT Data is transmitted, acted upon, or stored on equipment not owned by the DEPARTMENT;
- b. Allows a Contractor access to DEPARTMENT Data from a location other than the DEPARTMENT'S premises;
- c. Allows the DEPARTMENT access to data not owned by the DEPARTMENT which access may or may not result in the collection of DEPARTMENT Data.

**“Commercial Off-The-Shelf” (COTS)** shall mean products available in the commercial marketplace that can be purchased and used under government Contract. Does not include Custom Software.

**“Custom Product”** shall mean products, preliminary, final or otherwise, which are created or developed by Contractor, its Subcontractors, partners, employees or agents for the DEPARTMENT under the Contract.

**“Documentation”** shall mean the complete set of manuals (e.g., user, installation, instruction or diagnostic manuals) in either hard or electronic copy, that are necessary to enable the DEPARTMENT to properly test, install, operate and enjoy full use of the Product.

**“Licensed Software”** shall mean Software transferred upon the terms and conditions set forth in the Contract. “Licensed Software” includes Error Corrections, upgrades, enhancements or New Licensed Software Releases, and any deliverables due under a technical support/maintenance or service contract (e.g., patches, fixes, PTFs, programs, code or data conversion, or custom programming).

**“New Licensed Software Releases”** (Licensed Software Revisions) shall mean any commercially released revisions to the licensed version of Licensed Software as may be generally offered and available to the DEPARTMENT on technical support/maintenance. New Licensed Software Releases involve a substantial revision of functionality from a previously released version of the Licensed Software. Updates are provided when available, and Contractor is under no obligation to develop any future Product or functionality.

**“Product”** shall mean Deliverables furnished under this Contract by or through Contractor, including Cloud Solution, existing and custom Products, including, but not limited to: a) components of the hardware environment, b) printed materials (including but not limited to training manuals, system and user documentation, reports, drawings), whether printed in hard copy or maintained on diskette, CD, DVD or other electronic media c) third party software, d) modifications, customizations, custom programs, program listings, programming tools, data, modules, components, and e) any properties embodied therein, whether in tangible or intangible form (including but not limited to utilities, interfaces, templates, subroutines, algorithms, formulas, Source Code, object code).



**“Service”** shall mean the performance of a task or tasks and may include a material good or a quantity of material goods, and which is the subject of any purchase or other exchange.

**“System”** shall mean the complete collection of Hardware, Software and Services as described in the resulting Contract, integrated and functioning together, and performing in accordance with the Contract.

**“Virus”** shall mean any computer code, whether or not written or conceived by Contractor, that disrupts, disables, harms, or otherwise impedes in any manner the operation of the Product, or any other associated software, firmware, hardware, or computer system (such as local area or wide-area networks), including aesthetic disruptions or distortions, but does not include security keys or other such devices installed by Product manufacturer.

#### A. General Requirements.

CONTRACTOR agrees that it shall provide technology and/or services, including Cloud Solution, Commercial Off-the Shelf (COTS), and Custom Product or Service, in a manner consistent with the following requirements:

1. Host all DEPARTMENT Data and maintain and implement procedures to physically and logically segregate DEPARTMENT'S Data from CONTRACTOR'S data and data belonging to CONTRACTOR'S other customers.
2. Establish and maintain appropriate environmental, safety and facility procedures, data security procedures and other safeguards against the destruction, corruption, loss or alteration of the hosting Services and any DEPARTMENT Data, and to prevent unauthorized access, alteration or interference by third parties of the same.
3. Utilize industry best practices and technology (including appropriate firewall protection, intrusion prevention tools, and intrusion detection tools) to protect, safeguard, and secure the System and DEPARTMENT Data against unauthorized access, use, and disclosure. CONTRACTOR shall constantly monitor for any attempted unauthorized access to, or use or disclosure of, any of such materials and shall immediately take all necessary and appropriate action in the event any such attempt is discovered, promptly notifying the Office of Information Technology Service's Enterprise Information Security Officer (ITS EISO) of any material or significant breach of security with respect to any such materials.
4. When software vulnerabilities are revealed and addressed by a vendor patch, CONTRACTOR will obtain the patch from the applicable vendor and categorize the urgency of application as either "critical" or "non-critical" in nature. The determination of the critical versus non-critical nature of patches is solely at the reasonable discretion of CONTRACTOR in consultation with ITS EISO. CONTRACTOR will apply all critical security patches, hot fixes, or service packs as they are tested and determined safe for installation.

#### B. Data Location and Related Restrictions

All Data shall remain in the Continental United States (CONUS). Any Data stored, or acted upon, must be located solely in Data Centers in CONUS. Services which directly or indirectly access Data may only be performed from locations within CONUS.

#### C. Support Services

All helpdesk, online, and support services which access any Data must be performed from within

CONUS.

D. CONTRACTOR Portable Devices

CONTRACTOR shall not place Data on any portable Device unless Device is located and remains within CONTRACTOR'S CONUS Data Center.

E. Data Breach - Required CONTRACTOR Actions

Unless otherwise provided by law, in the event of a Data Breach, the CONTRACTOR shall:

1. Notify the ITS EISO and any potentially affected DEPARTMENT or their designated contact person(s), by telephone as soon as possible.
2. Consult with and receive authorization from the DEPARTMENT as to the content of any notice to affected parties prior to notifying any affected parties to whom notice of the Data Breach is required, either by statute or by the DEPARTMENT;
3. Coordinate all communication regarding the Data Breach with the ITS EISO and DEPARTMENT;
4. Cooperate with the DEPARTMENT and ITS EISO in attempting (a) to determine the scope and cause of the breach; and (b) to prevent the future recurrence of such security breaches; and
5. Take corrective action in the timeframe required by the DEPARTMENT. If CONTRACTOR is unable complete the corrective action within the required timeframe the DEPARTMENT may Contract with a third party to provide the required services until corrective actions and services resume in a manner acceptable to the DEPARTMENT, or until the DEPARTMENT has completed a new procurement for a replacement service system. The CONTRACTOR will be responsible for the cost of these services during this period. Nothing herein shall in any way (a) impair the authority of the Office of the Attorney General to bring an action against CONTRACTOR to enforce the provisions of the New York State Information Security Breach Notification Act (ISBNA) or (b) limit CONTRACTOR'S liability for any violations of the ISBNA or any other applicable statutes, rules or regulations.

F. Data Ownership

The DEPARTMENT shall own all right, title and interest in Data.

G. DEPARTMENT Access to Data

The DEPARTMENT shall have access to its Data at all times, through the term of this Contract. The DEPARTMENT shall have the ability to import or export Data in piecemeal or in its entirety at the DEPARTMENT'S discretion, without interference from the CONTRACTOR. This includes the ability for the DEPARTMENT to import or export Data to/from other CONTRACTORS.

H. CONTRACTOR Access to Data

The CONTRACTOR shall not copy or transfer Data unless authorized by the DEPARTMENT. In such an event the Data shall be copied and/or transferred in accordance

with the provisions of this Section. CONTRACTOR shall not access any Data for any purpose other than fulfilling the service. CONTRACTOR is prohibited from Data Mining, cross tabulating, monitoring DEPARTMENT'S Data usage and/or access, or performing any other Data Analytics other than those required under this Contract. At no time shall any Data or processes (e.g. workflow, applications; etc.), which either are owned or used by the DEPARTMENT be copied, disclosed, or retained by the CONTRACTOR or any party related to the CONTRACTOR. CONTRACTORS must perform industry standard back-ups of Data. Documentation of back-up must be provided to the DEPARTMENT upon request.

I. Suspension of Services

During any period of suspension of service, the DEPARTMENT shall have full access to all Data at no charge. The CONTRACTOR shall not take any action to erase and/or withhold any DEPARTMENT Data, except as directed by the DEPARTMENT.

J. Transferring of Data

The CONTRACTOR will not transfer Data unless directed to do so in writing by the DEPARTMENT. At the request of the DEPARTMENT, the CONTRACTOR will provide the services required to transfer Data from existing Databases to physical storage devices, to facilitate movement of large volumes of Data.

K. Requests for Data by Third Parties

Unless prohibited by law, CONTRACTOR shall notify the DEPARTMENT in writing within 24 hours of any request for Data (including requestor, nature of Data requested and timeframe of response) by a person or entity other than the DEPARTMENT, and the CONTRACTOR shall secure written acknowledgement of such notification from the DEPARTMENT before responding to the request for Data. Unless compelled by law, the CONTRACTOR shall not release Data without the DEPARTMENT'S prior written approval.

L. Transfer of Data at End of Contract

At the end of the Contract, CONTRACTOR may be required to transfer Data to a new CONTRACTOR and/or to the DEPARTMENT. This transfer must be carried out as specified by the DEPARTMENT. This transfer may include, but is not limited to, conversion of all Data into or from an industry standard format(s) including comma/delimited files, txt files, or Microsoft standard file formats.

M. Transfer of Data; Contract Breach or Termination

In the case of Contract breach or termination for cause of this Contract, all expenses for the transfer of Data shall be the responsibility of the CONTRACTOR.

N. Expiration or Termination of Services

Upon expiration or termination of this Contract, the DEPARTMENT shall have full access to all Data for a period of 90 calendar days at no charge. During this period, the CONTRACTOR shall not take any action to erase and/or withhold any Data, except as directed by the DEPARTMENT.

O. Return of Data

Upon expiration or termination of this Contract, the CONTRACTOR shall return Data in a format required by the DEPARTMENT. When requested by the DEPARTMENT, the CONTRACTOR must certify that all Data has been removed from its system and removed from backups.

P. Secure Data Disposal

If requested by the DEPARTMENT, the CONTRACTOR shall destroy Data in all of its forms, including all backups. Data shall be permanently deleted and shall not be recoverable, according to ITS Policy S13-003 Sanitization/Secure Disposal or successor and S14-003 Information Security Controls or successor. Certificates of destruction, in a form acceptable to the DEPARTMENT, shall be provided by the CONTRACTOR to the DEPARTMENT.

Q. Destruction of Data

The Data, and/or the storage medium containing the Data, shall be destroyed in accordance with applicable ITS destruction policies (ITS Policy S13-003 Sanitization/Secure Disposal and S14-003 Information Security Controls or successor) when the CONTRACTOR is no longer Contractually required to store the Data.

R. Background Checks

The DEPARTMENT may require the CONTRACTOR to conduct background checks on certain CONTRACTOR staff at no charge to the DEPARTMENT.

S. Separation of Duties

The DEPARTMENT may require the separation of job duties, and limit staff knowledge of Data to that which is absolutely needed to perform job duties.

T. Business Continuity/Disaster Recovery Operations

The CONTRACTOR shall provide and implement a business continuity and disaster recovery plan in accordance with the requirements of the RFP and approved by the New York State Office for Information Technology Services.

U. Compliance with Federal, State and Local Regulations

The DEPARTMENT may require the CONTRACTOR to provide verification of compliance with specific federal, state and local regulations, laws and information technology standards with which the DEPARTMENT is required to comply.

V. Warranties

1. Product Performance. CONTRACTOR hereby warrants and represents that the Product acquired by the DEPARTMENT under this Contract conform to CONTRACTOR'S specifications, performance standards and Documentation and that the Documentation fully describes the proper procedure for using the Products.
2. Title and Ownership. CONTRACTOR warrants and represents that it has (i) full ownership, clear title free of all liens, or (ii) the right to transfer or deliver specified license rights from a third party, to any Products or Services acquired by the DEPARTMENT under this Contract. CONTRACTOR shall be solely liable for any costs of acquisition associated therewith. CONTRACTOR shall indemnify the

DEPARTMENT and hold the DEPARTMENT harmless from any damages and liabilities (including reasonable attorneys' fees and costs) arising from any breach of CONTRACTOR's warranties as set forth herein.

3. Product Warranty. CONTRACTOR further warrants and represents that Products or Services shall be free from defects in material and workmanship and will conform to all requirements of this Contract for the CONTRACTOR'S standard commercial warranty period, if applicable, or for the term of this Contract from the date of acceptance, whichever is longer (the "Product warranty period").
4. Virus Warranty. The CONTRACTOR represents and warrants that any Licensed Software acquired under the Contract by the DEPARTMENT does not contain any known Viruses. CONTRACTOR is not responsible for Viruses introduced at the DEPARTMENT's Site
5. Workmanship Warranty. CONTRACTOR warrants that the Services acquired under this Contract will be provided in a professional and workmanlike manner in accordance with industry standards. The DEPARTMENT must notify CONTRACTOR of any Services warranty deficiencies within ninety calendar days from performance of the Services that gave rise to the warranty claim.
6. Survival of Warranties. All warranties contained in this Contract shall survive the termination of this Contract.
7. Prompt Notice of Breach. The CONTRACTOR shall promptly notify the DEPARTMENT in writing of any claim of breach of any warranty provided herein.
8. Additional Warranties. Where CONTRACTOR, Product manufacturer or service provider generally offers additional or more advantageous warranties than those set forth herein, CONTRACTOR shall offer or pass through any such warranties to the DEPARTMENT.
9. No Limitation of Rights. The rights and remedies of the DEPARTMENT provided in this clause are in addition to and do not limit any rights afforded to the DEPARTMENT by any other clause of this Contract.

#### W. Ownership/Title to Project Deliverables

Title and ownership to software delivered by CONTRACTOR under the Contract that is normally commercially distributed on a license basis by the CONTRACTOR or other independent software vendor proprietary owner Product, whether or not embedded in, delivered or operating in conjunction with hardware or Custom Products, shall remain with CONTRACTOR or the proprietary owner of other independent software vendor(s) ("ISV"). Effective upon acceptance, such Product shall be licensed to the DEPARTMENT in accordance with the CONTRACTOR or ISV owner's standard license CONTRACT, provided, however, that such standard license, must during the term of this Contract, at a minimum, grant the DEPARTMENT a non-exclusive license to use, execute, reproduce, display, perform, adapt (unless CONTRACTOR advises the DEPARTMENT as part of CONTRACTOR'S proposal that adaptation will violate existing contracts or statutes and CONTRACTOR demonstrates such to the DEPARTMENT'S satisfaction).

#### X. CONTRACTOR'S Obligation with Regard to ISV (Third Party) Product

CONTRACTOR shall be responsible for obtaining from the ISV third party proprietary owner/developer the rights set forth herein to the benefit of the DEPARTMENT at CONTRACTOR'S sole cost and expense.

Y. Escrow of Source Code

1. The CONTRACTOR shall either:
  - a. Provide the DEPARTMENT with the source code for the Product at the expense of the CONTRACTOR, place the source code in a third-party escrow arrangement with a designated escrow agent, who shall be named and identified to, and acceptable to, the DEPARTMENT, and who shall be directed to release the deposited source code in accordance with a standard Escrow Agreement acceptable and approved by the DEPARTMENT. The Escrow Agreement must, at minimum, provide for release of the source code to the DEPARTMENT if (i) CONTRACTOR files for bankruptcy or becomes insolvent (ii) CONTRACTOR misrepresents its Products or services (iii) CONTRACTOR fails to perform work as agreed upon in this Contract and subsequent Contract (iv) CONTRACTOR ceases business operations generally or fails to make available maintenance or support services for the then-current version of the licensed Product; or
  - b. Certify to the DEPARTMENT that the Product manufacturer/developer has named the DEPARTMENT as a named beneficiary of an established escrow arrangement with its designated escrow agent who shall be named and identified to the DEPARTMENT and who shall be directed to release the deposited source code in accordance with the terms of escrow. Source code, as well as any corrections or enhancements to such source code, shall be updated for each new release of the Product in the same manner as provided above and such updating of escrow shall be certified to the DEPARTMENT in writing. The CONTRACTOR shall identify the escrow agent upon commencement of the Contract term and shall certify annually that the escrow remains in effect in compliance with the terms of this paragraph.
2. Throughout the term of this Contract, the CONTRACTOR will deliver all software, including updates to the software, to the DEPARTMENT or the escrow agent within five (5) business days of implementing the use of such software so that all software in the custody of the DEPARTMENT or the escrow agent will be the then current version reflecting all changes and upgrades, but in any event, no less frequently than every six (6) months.
3. The CONTRACTOR also must place in escrow one (1) paper copy and one (1) electronic copy of maintenance manuals and additional documentation that are required for the proper maintenance of all systems and the software used to develop, test, and implement the system. Revised copies of manuals and documentation must be placed in the escrow account in the event they are changed. Such documentation must consist of logic diagrams, installation instructions, operation and maintenance manuals, and must be the same as that which the CONTRACTOR supplies to its maintenance personnel to maintain its software.
4. Except as otherwise provided in this Contract, the CONTRACTOR will not be obligated to provide source code (the un-compiled operating instructions for the software) for commercial software unless it is readily available from the licensor. When source code is provided, it must be provided in the language in which it was written and will include commentary that will allow a competent programmer proficient in the source language to readily interpret the source code and understand the purpose of all routines and subroutines contained within the source code. If the source code of such third-party is not

otherwise provided or freely available, the CONTRACTOR will be obliged to ensure that the source code and associated documentation is subject to an Escrow Agreement meeting the requirements of paragraph 1.a of this subsection. In the event that this Contract expires and is not renewed or extended, the DEPARTMENT has the option to continue the Escrow Agreement until such time that the DEPARTMENT is no longer using the software or documentation covered by this Escrow Agreement.

## APPENDIX H

### FEDERAL HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT BUSINESS ASSOCIATE AGREEMENT

For CONTRACTOR that creates, receives, maintains or transmits individually identifiable health information on behalf of a New York State Department of Health HIPAA-Covered Program.

- I. Definitions. For purposes of this Appendix H of this Contract:
  - A. "Business Associate" shall mean CONTRACTOR.
  - B. "Covered Program" shall mean the DEPARTMENT.
  - C. Other terms used, but not otherwise defined, in this Appendix H shall have the same meaning as those terms in 45 CFR Parts 160 and 164, which are implementing regulations for the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and the Health Information Technology for Economic and Clinical Health Act ("HITECH").
- II. Obligations and Activities of Business Associate:
  - A. Business Associate agrees to not use or disclose Protected Health Information other than as permitted or required by this Contract or as Required by Law.
  - B. Business Associate agrees to use the appropriate administrative, physical and technical safeguards to prevent use or disclosure of the Protected Health Information other than as provided for by this Contract and to comply with the security standards for the protection of electronic protected health information in 45 CFR Part 164, Subpart C. Business Associate agrees to mitigate, to the extent practicable, any harmful effect that is known to Business Associate of a use or disclosure of Protected Health Information by Business Associate in violation of the requirements of this Contract.
  - C. Business Associate agrees to report to Covered Program as soon as reasonably practicable any use or disclosure of the Protected Health Information not provided for by this Contract of which it becomes aware. Business Associate also agrees to report to Covered Program any Breach of Unsecured Protected Health Information of which it becomes aware. Such report shall include, to the extent possible:
    1. A brief description of what happened, including the date of the Breach and the date of the discovery of the Breach, if known;
    2. A description of the types of Unsecured Protected Health Information that were involved in the Breach (such as whether full name, social security number, date of birth, home address, account number, diagnosis, disability code, or other types of information were involved);



3. Any steps individuals should take to protect themselves from potential harm resulting from the breach;
  4. A description of what Business Associate is doing to investigate the Breach, to mitigate harm to individuals, and to protect against any further Breaches; and
  5. Contact procedures for Covered Program to ask questions or learn additional information.
- D. Business Associate agrees, in accordance with 45 CFR § 164.502(e)(1)(ii), to ensure that any subcontractors that create, receive, maintain, or transmit Protected Health Information on behalf of the Business Associate agree to the same restrictions and conditions that apply to Business Associate with respect to such information.
- E. Business Associate agrees to provide access, at the request of Covered Program, and in the time and manner designated by Covered Program, to Protected Health Information in a Designated Record Set, to Covered Program in order for Covered Program to comply with 45 CFR § 164.524.
- F. Business Associate agrees to make any amendment(s) to Protected Health Information in a Designated Record Set that Covered Program directs in order for Covered Program to comply with 45 CFR § 164.526.
- G. Business Associate agrees to document such disclosures of Protected Health Information and information related to such disclosures as would be required for Covered Program to respond to a request by an Individual for an accounting of disclosures of Protected Health Information in accordance with 45 CFR § 164.528; and Business Associate agrees to provide to Covered Program, in time and manner designated by Covered Program, information collected in accordance with this Contract, to permit Covered Program to comply with 45 CFR § 164.528.
- H. Business Associate agrees, to the extent the Business Associate is to carry out Covered Program's obligation under 45 CFR Part 164, Subpart E, to comply with the requirements of 45 CFR Part 164, Subpart E that apply to Covered Program in the performance of such obligation.
- I. Business Associate agrees to make internal practices, books, and records, including policies and procedures and Protected Health Information, relating to the use and disclosure of Protected Health Information received from, or created or received by Business Associate on behalf of, Covered Program available to Covered Program, or to the Secretary of the federal Department of Health and Human Services, in a time and manner designated by Covered Program or the Secretary, for purposes of the Secretary determining Covered Program's compliance with HIPAA, HITECH and 45 CFR Parts 160 and 164.

### III. Permitted Uses and Disclosures by Business Associate

- A. Except as otherwise limited in this Contract, Business Associate may only use or disclose Protected Health Information as necessary to perform functions, activities, or

services for, or on behalf of, Covered Program as specified in this Contract.

- B. Business Associate may use Protected Health Information for the proper management and administration of Business Associate.
- C. Business Associate may disclose Protected Health Information as Required by Law.

#### IV. Term and Termination

- A. This Appendix H shall be effective for the term as specified on the cover page of this Contract, after which time all of the Protected Health Information provided by Covered Program to Business Associate, or created or received by Business Associate on behalf of Covered Program, shall be destroyed or returned to Covered Program; provided that, if it is infeasible to return or destroy Protected Health Information, protections are extended to such information, in accordance with the termination provisions in this Appendix H of this Contract.
- B. Termination for Cause. Upon Covered Program's knowledge of a material breach by Business Associate, Covered Program may provide an opportunity for Business Associate to cure the breach and end the violation or may terminate this Contract if Business Associate does not cure the breach and end the violation within the time specified by Covered Program, or Covered Program may immediately terminate this Contract if Business Associate has breached a material term of this Appendix H and cure is not possible.
- C. Effect of Termination.
  - 1. Except as provided in paragraph (2) of this subsection, upon termination of this Contract, for any reason, Business Associate shall return or destroy all Protected Health Information received from Covered Program, or created or received by Business Associate on behalf of Covered Program. This provision shall apply to Protected Health Information that is in the possession of subcontractors or agents of Business Associate. Business Associate shall retain no copies of the Protected Health Information.
  - 2. In the event that returning or destroying the Protected Health Information is infeasible, Business Associate shall provide to Covered Program notification of the conditions that make return or destruction infeasible. Upon mutual agreement of Business Associate and Covered Program that return or destruction of Protected Health Information is infeasible, Business Associate shall extend the protections of this Appendix H to such Protected Health Information and limit further uses and disclosures of such Protected Health Information to those purposes that make the return or destruction infeasible, for so long as Business Associate maintains such Protected Health Information.

#### V. Violations

- A. Any violation of this Appendix H may cause irreparable harm to the DEPARTMENT. Therefore, the DEPARTMENT may seek any legal remedy, including an injunction or

specific performance for such harm, without bond, security or necessity of demonstrating actual damages.

- B. Business Associate shall indemnify and hold the DEPARTMENT harmless against all claims and costs resulting from acts/omissions of Business Associate in connection with Business Associate's obligations under this Appendix H. Business Associate shall be fully liable for the actions of its agents, employees, partners or subcontractors and shall fully indemnify and save harmless the DEPARTMENT from suits, actions, damages and costs, of every name and description relating to breach notification required by 45 CFR Part 164 Subpart D, or State Technology Law § 208, caused by any intentional act or negligence of Business Associate, its agents, employees, partners or subcontractors, without limitation; provided, however, that Business Associate shall not indemnify for that portion of any claim, loss or damage arising hereunder due to the negligent act or failure to act of the DEPARTMENT.

#### VI. Miscellaneous

- A. Regulatory References. A reference in this Appendix H to a section in the Code of Federal Regulations means the section as in effect or as amended, and for which compliance is required.
- B. Amendment. Business Associate and Covered Program agree to take such action as is necessary to amend this Appendix H from time to time as is necessary for Covered Program to comply with the requirements of HIPAA, HITECH and 45 CFR Parts 160 and 164.
- C. Survival. The respective rights and obligations of Business Associate under Section IV.C of this Appendix shall survive the termination of this Contract.
- D. Interpretation. Any ambiguity in this Appendix H shall be resolved in favor of a meaning that permits Covered Program to comply with HIPAA, HITECH and 45 CFR Parts 160 and 164.
- E. HIV/AIDS. If HIV/AIDS information is to be disclosed under this Contract, Business Associate acknowledges that it has been informed of the confidentiality requirements of Public Health Law Article 27-F.